Vol. VI

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 792

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, APPELLANT,

vs.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND

FILED MARCH 27, 1929

No. 826

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, APPELLANTS,

vs.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

FILED APRIL 10, 1929

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

(34,101, 34,135)

(33,773, 33,774)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 464

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, APPELLANT,

vs.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND.

No. 465

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, APPELLANTS,

vs.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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IN COURT OF APPEALS OF MARYLAND, APRIL TERM, 1928

No. 52

HAROLD E. WEST, et al.

vs.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

DOCKET ENTRIES

Appeal from the Circuit Court No. 2 of Baltimore City. Filed June 5th, 1928, Advanced from No. 19 of the October Term, 1928.

July 16th, 1928, Decree affirmed in part and reversed in part, and case remanded for further proceedings in accordance with the views expressed in this opinion, each party to pay one-half the costs.

Opinion filed. Op., Offutt, J. To be reported. Bond, C. J., and Parke, J., dissent in part.

July 16th, 1928, Decree filed.

July 23rd, 1928 concurring opinion filed by Adkins, J.

August 2nd, 1928, dissenting opinion filed by Parke, J.

August 2nd, 1928, dissenting opinion filed by Bond, C. J.

Certificate to foregoing paper omitted in printing.

IN COURT OF APPEALS OF MARYLAND

HAROLD E. WEST, et al. Constituting the Public Service Commission of Maryland,

vs.

UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE

DECREE—Filed July 16, 1928

The appeal in this case, standing ready for hearing, was argued for the respective parties, and the proceedings have been since considered by the Court.

It is thereupon this 16th day of July, 1928, by the Court of Appeals of Maryland, and by the authority thereof, adjudged, ordered and decreed that the decree dated May 11th, 1928, of the Circuit Court No. 2 of Baltimore City, be and the same is hereby affirmed in part and reversed in part, and case remanded for further proceedings in accordance with the views expressed in this opinion, each party to pay one-half hte costs.

Carroll T. Bond, Hammond Urner, Wm. H. Adkins, T. Scott Offutt, D. Lindley Sloan.

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

OPINION—Filed July 16, 1928

Judge Offutt delivered the Opinion of the Court. Bond, C. J., and Parke, J. dissents in part.

The United Railways and Electric Company of Baltimore, came into existence on the fourth day of March 1899 as the result of a merger of all the street railway lines operating in and near Baltimore, with a total authorized capitalization of $76,000,000. of which $38,000,000. was in bonds, $14,000,000. in preferred stock and $24,000,000. in common stock. The base fare at that time charged by its several constituent companies within the city limits was five cents, and by Chapter 313 of the Acts of 1900 the consolidated corporation hereinafter called the Company was specifically limited to a fare of five cents for the transportation of adults and three cents for children from any point on its lines within said city to any other point thereon which could be reached directly or by transfer at intersecting points, and that schedule it maintained until 1918.

In the meantime, the State, moving with a growing trend throughout the country, had abandoned its traditional policy of regulating public service corporations by direct legislative action, and had by Chapter 180 of the Acts of 1910 created the Public Service Commission of Maryland, hereinafter called the Commission to which it had com-

mitted plenary powers in respect to regulating the rates and service of public utilities, and had repealed existing legislation fixing rates for service furnished by such utilities, such repeal to become effective when and as the Commission determined in accordance with the law that such rates should be superseded by others. Gregg vs. Public Serv. Com. 121 Md. 30.

And on July 19, 1918, the Company for the first time applied to the Commission for its approval of a schedule of rates under which it would receive six cents for adults and a uniform increase of one cent from children between four and twelve years of age and riders using commutation tickets. The Commission was unable to hear the application immediately and the Company on August 28, 1918, with the assent of the Commission, filed a revised schedule which took effect October 1st, 1918, and remained in effect until January 7th, 1919 when it was formally approved by the Commission.

On May 23rd 1919, the Company applied for a further increase from six to seven cents for cash fares with four tokens for twenty five cents, which it subsequently changed to a request that it be permitted to collect a cash fare of ten cents with two tokens for fifteen cents, and on September 30th, 1919, it was permitted to charge a cash fare of seven cents or six and one half cents when tickets or other tokens were purchased. On December 26th 1919, it again applied for an increase in its rate schedule and the Commission advanced the base fare from six and one half cents to seven cents flat. On March 31st, 1924 at the Company's request the Commission authorized a further increase of the base fare to seven and one half cents, and on August 1st, 1927, it filed an application for permission to increase its base fare to ten cents, which was one hundred per cent more than it had charged prior to October 1st, 1918, and 33⅓ per cent more than it had been allowed to charge from March 31st, 1924, until it filed that application, and in connection with that request it alleged an apprehended financial crisis, and urged that it be allowed to put the increase in effect immediately as an emergency measure pending any hearing that might be had on its application for a permanent increase of its base fare to ten cents. The application for an emergency rate was denied but on Feb-

ruary 10th, 1928, the Commission passed an order which denied the application for an increase of the base fare to ten cents, but which permitted the Company

"to charge and collect for the transportation of persons over its several street railway lines, in Baltimore City and vicinity, a base rate fare of eight and one-third cents when tickets or fare checks are purchased, or nine cents cash, for the conveyance of each passenger over twelve years of age, and five cents for each child between the ages of four and twelve years, between any of the points designated in the schedule of the said Company filed with the Commission pursuant to the requirements of the Commission's order No. 8340 entered in Case No. 1682 on May 26th, 1924, or between the intermediate points, in either direction, on any of such lines, except in so far as the zones on any of the said lines are hereinafter modified or changed.

That the first fare zone on the Halethorpe line be and it is hereby extended to the terminus of the said line at Halethorps, effective from and after midnight of February 12th, 1928."

The Company, being dissatisfied with that order, on March 13th 1928, filed, in Circuit Court No. 2 of Baltimore City a Bill of Complaint in which it asked that that order be nullified in so far as it or any pervious order of the Commission prevented it from charging a flat ten cent fare, or, from continuing the first and second Halethorpe zones, and it further asked that the Commission be enjoined from enforcing that order or any prior order limiting the Company's rates. The Commission answered, the case was set down, evidence offered by the Commission, the Company and intervening persons interested in the matter, and after argument submitted for decree, and on May 11th, 1928, a decree was filed vacating the order in so far as the same purports to limit the rates of the plaintiff; except, however, as to that portion of said order which extended the first fare zone on the Halethorpe line to the terminus of said line at Halethorpe, as to which latter provision in said order the bill of complaint is hereby dismissed." and enjoining the defendants from enforcing that or any other orders of the Comission in so far as they limit or purport to limit the rates of fare to be charged by the Com-

pany. From that decree the Company and the Commission appealed, the Company on the ground that the Court erred in abolishing the second zone on the Halethorpe line, and the Commission, on the ground that the Court erred in vacating so much of its order as affected the rate of fare to be charged by the Company, and in enjoining it from enforcing such order. It may be noted that the relief granted in the decree is not precisely that prayed in the Bill. The Commission by its order did three things, it refused the Company's application for a ten cent fare, it fixed an eight and one-third cents fare, and it consolidated the two Halethorps Zones in one. The appellee in its Bill, asks that all orders of the Commission which limit its rate or prevent it from charing a ten cent fare be set aside, and that the Commission be enjoined from enforcing any such orders. The decree does not refer to a ten cent fare at all, but vacates all orders of the Commission, so far as they purport to limit the "rates of the plaintiff," and it based that ruling upon the Commission's "election" not to have the case remanded to them. But the Court clearly had no right to fix the Company's rates, since its function was judicial and confined to determining whether the order of the Commission was valed or invalid, and if in its judgment the action of the Commission was unlawful it should have remanded the case to the Commission for such further action as might be appropriate, for even if in fact the eight and one third cent rate allowed was inadequate to allow the Company a fair return on the value of its property, that fact did not oust the jurisdiction of the Commission to fix the Company's rates nor did it authorize the Court or the Company to fix them, for under the statute the power to do that is in the Commission alone. Gregg vs. Public Service Commission, supra; Chenoweth vs. Pub. Serv. Com. 143 Md. 626; Harve de Grace Bridge Co. vs. Public Service Commission, 132 Md. 24, Code Art 23 Sec. 375. But as the decree reads, it not only vacates the order of the Commission of February 10th, 1928, but in effect all other orders, affecting the Company's rate schedules, and it therefore either terminates this proceeding entirely and leaves the Company free to file a new application for increased rates, or it leaves the question of rates altogether at the discretion of the Company.

But neither of those alternatives was authorized by anything in the statute, but if the order was invalid because it was unfair, confiscatory, unlawful or for any reason, it should have been vacated and the case remanded to the Commission, for further proceedings in accordance with such guides, rules, and standards, as the Court might by appropriate order or decree direct.

The central dominating question presented by the appeal, is whether the schedules of rates promulgated by the Commission, is insufficient to yield such an income as will give to the Company a fair return on the value of its property. In the argument of the case it was said that the Commission had limited the Company to a return of 6.26% on the value of its property, but the order did not so state. What it did do, was to fix a schedule of rates, which after deducting the allowances approved by the Commission for maintenance, replacement, operation, financing and other expenses, would yield that return, but if more efficient or economical management resulted in a larger net return there was nothing in the order to prevent the Company from retaining the benefit of that saving, even though it increased its net earnings to more than 6.26% of the value of its property. So that the question actually is, whether a schedule of fares which after deducting all reasonable and proper expenses for the management and operation of the Company permits it to earn a net return of 6.26% on the value of its property, is confiscatory within the meaning of the State and Federal Constitutions, or, unlawful and unreasonable within the meaning of the Statute creating the Commission. To that question there are various approaches, all differing in some degree in the effect they have upon the meaning and weight of the facts of the case.

It may be approached from the Company's point of view, in which case the Commission's function would be largely administrative, and the ultimate determination of the propriety of its rates would rest with the Company, and the sole test of the lawfulness of such rates would be whether they were fair to it, and would yield what in its judgment was a proper return on the valuation of its property.

It may be approached from the standpoint of the patrons of the service, in which event the power of the Commission to fix the rates would be bounded on one side by the rule that the rates must in no event exceed the value of the service and on the other by the rule so long as the rates did not exceed the value of the service the Company was entitled to a fair return on the value of its property. Then there is a third approach, in which the question is viewed from the standpoint of the State, in which case, factors which from the standpoint of the public or the corporation have varying weights, such as the nature and necessity of the service, the effect of its continuance or withdrawal, both upon the security holders of the corporation, and upon property values, and the welfare of the people in the territory served by it, the extent to which the State itself is a partner in the enterprise, and the circumstances and conditions under which the Company acquired and exercises its franchises and privileges may become of paramount and controlling importance, and in our judgment the question must be approached from that direction.

Before dealing specifically with it however, we will refer briefly and generally to the powers, functions and duties of the Commission, to the extent of its jurisdiction and to the weight to be given its decisions. That the power committed to the Commission is legislative in character, notwithstanding that the manner in which it is exercised is forensic, is no longer open to question, Gregg vs. Pub. Serv. Com. supra, Chenoweth vs. Pub. Ser. Com. supra, and except where limited by the statute itself or some constitutional provision the acts of the Commission done in the exercise of its statutory powers are entitled to the same weight which would be given a direct act of the legislature. Knoxville vs. Knoxville Water Co. 211 U. S. 8, West v. Byron 138 Atl. 410.

There has been and is some uncertainty as to the extent to which courts will go in reviewing the conclusions and decisions of such administrative agencies as the appellant. In Interstate Commerce Commission vs. Union Pac. R. R. Co. 222 U. S. 541, in reviewing an order of that Commission, it was said:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; Or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * *

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will nor consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience'. Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

While in the later case of the Ohio Valley Water Co. vs. Ben Avon Borough 253 U. S. 289, where the Supreme

Court of Pennsylvania held that where there was substantial evidence to support them, the findings of the Public Service Commission would not be reviewed on appeal, the Court in reversing that decision said:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. * * * In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment. * * *."

The question came before this Court and was decided in accordance with the views expressed in Interstate Commerce Com. vs. Union Pac. R. R. Co. supra, West v. Bryon, supra. In that case, speaking through Judge Parke, it was said:

> "The first rule is the order will not be disturbed except upon clear and satisfactory evidence that it is unreasonable or unlawful. This is a legislative mandate which is reinforced by the fact that the commission is a tribunal erected by law, informed by experience, and assisted by a trained corps of subordinates. Code, art. 23, Sec. 408; Public Service Commission v. N. C. Ry. Co., 122 Md. 355, 388, 391, 392, 90 A. 105; Hevre de Grace Bridge Co. v. Public Service Commission 132 Md. 16, 4, 103 A. 319; Interstate Commerce Commission v. Union Pac. Ry. Co. 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

And that statement of the rule is not only supported by the weight of authority (see discussion in Dickinson on Administrative Law) but is required by the Statute itself, Code, Art. 23 Sec. 408, and appears to be indicated by the very nature and necessity of the thing for reasons pointed out by Judge Parke in West vs. Bryon supra. It is true that in Ohio Valley Water Co. vs. Ben Avon Borough supra, the court said that where the issue of confiscation

was raised the due process clause of the 14th Amendment required that provision be made for submitting that question to some judicial tribunal authorized to adjudicate it upon its "own independent judgment as to both law and facts;" and that expression is consistent with the theory that in reviewing the decision of an administrative agency the court would review the facts as in an equity case. But such a conclusion is inconsistent with all prior decisions of the Supreme Court, and while in Bluefields W. W. & I Co. cs. Pub. Ser. Co. 262 U. S. 689 it was again stated that upon the question of confiscation the utility was entitled to the "independent judgment of the court as to both law and facts," it is not thought that by that language, the court in either of those cases, meant to say anything more than that where the facts are undisputed or must be taken as established, and the inference to be drawn from them inevitable, the courts will review any conclusion of law predicated upon such facts. But we do not believe that it was intended to overturn the policy established by the decisions of that court, and by many state and federal statutes which commits to such agencies as Public Service Commissions, the ascertainment of facts which rest in conflicting evidence, and we find therefore no inconsistency between the language quoted from those opinions and the language of this Court in West vs. Bryon supra, and we feel too that in dealing with the constitutional question involved in confiscation some weight must be given to the statute which places upon the person attacking the decision of the Commission the burden of establishing its unlawful or unreasonable character by "clear and satisfactory proof." West vs. Bryon, supra.

Reverting now to the main question presented by the appeal, the first inquiry is whether a schedule of rates which permits the appellee to earn 6.26% on the fair value of its property can be said to be confiscatory within the meaning of that clause of the 14th Amendment of the Federal Constitution which denies to the states the power of depriving any person of his property without due process of law. Confiscation, in that sense, is essentially a relative, and not an absolute term, and it does not exist apart from the facts which are said to occasion it. No fixed or general rule can be announced by which it can be deter-

mined whether it exists in any given case, because whether it exists or not must be determined from factors which vary with the facts of each case, since rate cases like wills seldom have "twin brothers." Covington & L. Turnpike Company vs. Sanford 164 M. S. 592 et seq. and we know of no authority for the proposition that public utilities without regard to circumstances or conditions are entitled to a return of any given amount of percentage on the value of their properties. For while there are cases which hold that such utilities are entitled to a return of six or seven or eight per cent on the value of their properties, they have no controlling weight, because the decisions are uniformly found to be based upon facts peculiar to the several cases. So in this particular case, in deciding whether the schedule of rates prescribed by the Commission, is confiscatory, we must be guided by the facts of this case, and are little aided by what this court or some other court may upon different facts have found to be lawful or confiscatory, fair or unreasonable rates.

To attempt to analyze in detail the mass of factual and opinion evidence adduced before the Commission is neither practicable or necessary, since such facts as are relevant to the question before us rest for the most part in records of the Company or the Commission and are not in dispute, and we will at this time only refer to such as are necessary to indicate the contention of the parties.

The total value of the Company's property including easements may be placed at $75,000,000. That was the valuation placed upon it by the Commission in 1924, and while there was some dispute as to whether that figure should not be increased to include additions since the valuation, that contention was not stressed in this court, but was treated as a matter of detail which could be adjusted to fit the facts at some future time, so that the figure of $75,000,000 may be treated as the true value of the Company's property for all the purposes in this case..

The financial structure of the Company appears from the following tabulation in which the "basic value" of its property is assumed to be $70,000,000, the value placed upon it by the Commission exclusive of the value of the easements which has been fixed at $5,000,000:

Class of Securities	Outstanding 12/31/1926	Per cent of basic value	Outstanding 6/30/1927	Per cent of basic value
Mortgage Bonds	47,405,000	67.7	47,405,000	67.7
Miscellaneous Obligations	6,392,700	9.1	7,664,200	10.9
Income Bonds	13,977,000	20.0	13,977,000	20.0
Total Bonds & Miscellaneous Obligations	67,774,700	96.7	69,046,200	98.7
Stocks	20,461,200	29.2	20,461,200	29.2
Grand Total	88,235,900	126.0	89,508,400	127.9

And it appears that the Company has for some time past been paying, and still pays, dividends on its common stock at the rate of 4%, and that that stock, having a par value of $50 per share, has in late years sold on the Baltimore Stock Exchange at prices ranging from $16 to $21 per share, and it further appears that its mortgage bonds bought at current market prices yield the purchaser a return of about 6%. From time to time since 1911, the Company has had occasion to borrow for varying periods, and the rates at which this money was bought, as shown by the following tabulation, throws some light upon the changes in its credits:

Issued		Description	Amount	Proceeds	Rate received	Interest rate
1911	2nd Half	3 Years' Notes	$3,125,000	$3,046,876	97½	5%
1914	"	10 Year Car Trust Certificate	153,000	153,000	100	6%
19	2nd Half	2 Year 5% Collat. Trust Notes	1,000,000	995,000	99½	5%
1914	2nd Half	1st Mtge. Gold Sinking Fund Bonds (Md. Elec. Rys.)	489,000	469,440	96	5%
1916	Feb.	5 Year 5% Gold Notes	2,750,000	2,695,000	98	5%
1917	Oct.	6% Convertible Gold Notes	3,000,000	2,850,000	95	6%
1919		5 Year Convertible Notes	1,528,000	*	*	5%
1917		1st Mtge. Gold Bonds (Md. Elec. Rys.)	457,000	447,860	98	5%
1920	2nd Half	Car Trust Certif.—Series 1920 (10 Years)	875,000	831,250	95	8%
1921	Feb.	7½ Coupons Gold Notes	1,500,000	1,383,750	92¼	7½%
1922	Apr.	1st Consol. Mort. 50 Year Gold Bonds	6,000,000	5,550,000	92½	6%

Issued		Description	Amount	Proceeds	Rate received	Interest rate
1922		(1st Consol. Mort. 50 Year 6% Gold Bonds).....	6,000,000	5,500,000	92½	6%
		(In lieu of 4% Bonds ($2,684,000 @ $250 per Bond)		671,000		6%
1922	July	5 Year 6% Gold Notes.....	2,500,000	2,375,000	95	6%
1924	1st Half	1st & Refunding Gold Bonds Ser. A. (Md. Elec. Rys.)..	4,000,000	3,790,000	94¾	6½%
1927	July	3 Year Notes.....	2,500,000	2,412,000	96½	6%

From another table filed by People's Counsel it appears that the net income of the Company, for the years from 1920 to 1926 inclusive was as follows:

1920—1,043,599.21 1921—735,230.58 1922— 799,268.99 1923—976,266.38
1924— 976,068.39 1925—980,609.53 1926—1,010,054.41

and that for the same period the operating income was:

1920—17,313,589.84 1921—16,332,865.34 1922—16,122,592.02
1923—16,461,798.86 1924—16,453,254.31 1925—16,621,220.20
1926—16,715,709.07

Another tabulation filed on behalf of the People indicated the following ratio of funded debt to track operation per mile, and gross revenue per dollar in a number of American cities:

	Funded debt and income bonds	Funded debt per mile of track operation	Funded debt per dollar gross revenue
Baltimore	67,774,700	164,000	4.05
Without Income Bonds	53,797,700	130,000	3.22
Detroit	35,155,000	88,000	1.63
Los Angeles	19,852,000		1.64
San Francisco	11,695,000	42,600	1.19
Pittsburgh	34,215,000	57,700	1.57
Boston	49,819,000	100,200	1.41
Cleveland	5,495,000	13,310	.30
St. Louis	52,590,000	120,900	2.80
St. Paul, Minn.	19,478,000	38,700	1.40
Buffalo	25,392,782	62,200	2.47
Providence	13,714,000	47,200	1.61
Washington	5,606,000	77,000	1.21
Cincinnati	5,288,400	19,840	.65
Indianapolis	13,497,517	56,300	2.35
Denver	10,863,500	48,900	2.38

Still another table showed the current rates of fare, rate of return, and base in twelve representative American cities comparable in size to Baltimore, to be as follows:

	Rate of return	Base	Fare
Baltimore (New Fare)	6.26	$75,000,000	9¢—3 for 25¢
Boston	4.64	159,025,142	10¢—4 for 25¢ (limited)
Chicago Surface Lines	6.27	164,600,000	7¢—3 for 20¢
Cincinnati	4.16	36,381,017	10¢—3 for 25¢
Cleveland	4.35	37,106,506	7¢—8 for 50¢
Kansas City	1.82	23,300,000	8¢—15 for $1.00
Los Angeles	3.06	54,000,000	5¢
Philadelphia	5.07	216,000,000	8¢—2 for 15¢
Pittsburgh	5.85	68,170,000	10¢—3 for 25¢
St. Louis	4.66	52,024,192	8¢—2 for 15¢
San Francisco	5.37	35,000,000	5¢
Washington	4.69	50,000,000	8¢—6 for 40¢

And another table lists seventy-nine American cities each having a population of over 100,000, and shows the popula-

tion of each city, the rate of fare charged on the street railways, and commutation privileges, established in connection with such fares in each city. In analyzing that table Mr. H. Carl Wolf, engineer for the Commission, testified:

"Of the 81 cities listed as having a population of 100,000 or more, only 19 of them have a fare higher than Baltimore. There are 30 cities with a ten cent fare. Only one of these has a straight ten cent fare with no tokens. Ten of them, or one-third the number have an eight and one-third cent token fare, six of them have an eight and one-third cent token fare, plus a pass system, one of them has a seven and a half cent token fare, plus a pass system, and when the Commission recalls that at the present time 97% of the full fare passengers in Baltimore are using the token fare they will see that the ten cent-seven and a half cent fare, plus a weekly pass, if applied to Baltimore, would cause practically no increase in fare, and probably a decrease.

There is one of these 30 cities with a ten cent fare which has not a token fare but which does have a pass, and 11 of them with ten cent fares charge 7½¢ or lower for tokens with no passes."

And in criticising that analysis Mr. C. D. Emmons, president of the Company said:

"I have this from the late bulletin; that the trend of fares over the United States has been upward since July 1, 1923, and is continuing upward. On October 1, 1927, the average fare of 272 cities reporting was 7.9516c and November 1, 1927, the average fare was 7.984c, which is the highest average fare that the street railway industry has ever had not excluding the War period.

There are at the present time, or since the November bulletin, there have been twelve different cities that have changed the rate of fare. There are three interurban roads that have changed the rate of fare. At the present time there are fourteen fare cases pending.

Q. What are the direction of those changes?

A. The changes are all up with the exception of a municipal city which has put in a weekly pass, and the information here does not say about the flat fare. I presume it's the same, a flat fare with a weekly pass. I think they give

a statement that there are only, I have forgotten, of basic 10¢ fare cities, but my statement here is that there are—I got this morning, dated November 26th, from New York—this gives 219 United States cities.

Q. Having a basic fare of 10¢?

A. That's right, yes.

(Mr. Tingley:) Those are not cities of over 100,000?

(The Witness:) No, but I counted the cities of over 100,000 in this and there are 31 cities of over 100,000 that have a basic 10¢ fare. * * *

(The Witness:) Cicero, Illinois, 65,400; Forest Park, Illinois, 10,768; Maywood, Illinois, 12,072; Oak Park, Illinois, 53,500; Auburn, Maine, 16,985; Bangor, Maine, 25,978; Bath, Maine, 14,731; Lewiston, Maine, 35,500; Billerica, Massachusetts, 3,646; Boston, Massachusetts, 787,000; Braintree, Massachusetts, 10,580; Concord, Massachusetts, 6,461, Framingham, Massachusetts, 17,033; Holyoke, Massachusetts, 60,400; Lexington, Massachusetts, 6,350; Natick, Massachusetts, 10,907; Needham, Massachusetts, 7,012; Newburyport, Massachusetts, 15,618; Newtonville, Massachusetts, 5,700; Wakefield, Massachusetts, 13,025; Waltham, Massachusetts, 35,700; Wellesley, Massachusetts, 6,224; Woburn, Massachusetts, 16,574; Worcester, Massachusetts, 193,300; Morristown, New Jersey, 12,548; Ocean City, New Jersey, 3,721; Lackawanna, New York, 17,918; Mauch Chunk, Pennsylvania, 3,666; West Chester, Pennsylvania, 11,717. * * *

(Mr. Clark:) How many states now have you cited there?

(The Witness:) Six states."

From other tables it appears that the wages of "platform" men have increased from a maximum of 22¢ an hour in 1913 to a maximum of 53¢ an hour in 1926, that other wages showed an approximately similar increase, and that during the same period the general cost of living showed an increase from a base index of 100 to an index of 173.

Perhaps the most significant fact connected with the question before us is the decline in the number of revenue passengers carried by the Company from 253,834,179, in 1919 to 225,255,633 in 1926, and 145,256,680 (August ap-

proximated) for eight months of 1927. Coincident with that decline was a gradual increase in the rates of fare from 5¢ prior to 1919 to 7½¢ in 1927, and an increase in the registration of automobiles from 85,430 in 1919 to 267,649 in 1926.

In connection with those figures a further fact appears which is that while the total number of revenue passengers is decreasing, the peak load of passengers that is the greatest number of passengers carried during the "rush hours" each day has increased, and to accommodate that increasing demand, it has become necessary for the Company to maintain an increased equipment which is to some degree idle during a part of the day.

One of the contentions made by the Company was that the existing rates so affect its credit that it is compelled to pay unreasonably high rates for money, and in connection with that contention it filed a table showing the rates it has paid since 1920, which in part shows:

Date of Issue	Amount of Issue	Less Banker's Commission	Cost of Money to Company	Market Price
July 1, 1920 Car Trust 8% Gold Certificates	875,000	43,750	9⅜%	100
Jan. 15, 1921 Ten Year, 7½% Gold Notes	1,500,000	90,000	8.70%	98¼
Mar. 1, 1922 First Consolidated Mortgage, 6s, due March 1, 1949	6,000,000	270,000	6.75%	97
Mar. 1, 1922 Deposit $250. per $1,000 bond by holders of $2,684,000, first consolidated mortgage 4s to secure additional 2% interest coupons	671,000	28,903	6.60%	—
Aug. 1, 1922 Five Year, 6% Gold Notes	2,500,000	75,000	7.27%	98
Jan. 1, 1928 The Maryland Electric Rwys. Co. First and Refunding Mortgage Gold Bonds; Series "A"—6½% due Jan. 1, 1957	4,000,000	210,000	6.93%	100
Mar. 1, 1927 Three year, 6% Gold Notes	2,500,000	62,500	7.32%	99¼

These facts are but a small part of those to be found in the mass of evidence contained in the record, but they are sufficient to indicate the grounds for the conflicting contentions of the parties to this appeal, which as we understand them are in substance as follows:

In respect to the main question the appellant appears to contend that the schedule of fares promulgated by the Commission, is, under existing conditions, all that the service is worth, and fair alike to the Company and the public, but, that whether fair to the Company or not no higher rates should be allowed, because the Company is only entitled to collect from the public the value of the service it renders.

The contention of the Company on the other hand seems to be that it is entitled to earn a fair return on the value of its property, that "fair return" means a return of at least 8% on the value thereof, and that it is entitled to a schedule of rates high enough to insure that return regardless of the value of its service to the public. Or reduced to its lowest terms, and quoting its own language the Company's proposition is, that "compulsory limitation of the Company's rates to yield a maximum of less than eight per cent is confiscatory and unlawful," while the Commission contends that "rates must in no event exceed the value of the service, regardless of return or confiscation," and somewhere between those extreme theories lies the law.

Manifestly the proposition submitted by the Company is broader than the law while that of the Commission is too indefinite and vague to be of much aid in settling the question before us. There is so far as we know no rule of law which guarantees to Public Service corporations the right to earn eight per cent on the value of their properties regardless of the fairness of their rates to the public or of any other fact or circumstance, but the law as stated in C. & L. Tpke Co. vs. Sandford, supra, is to the contrary, there it is said:

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the Company (as was alleged and as the demurrer admitted) could not earn more than 4% per cent on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates

to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

Nor, is there any rule by which we may precisely determine what is the actual value to the public of such service as that which the Company sells.

When the Company speaks of a "return of not less than eight per cent" on its property it must be remembered, that nearly 68,000,000 of its actual value, is covered by bonded indebtedness or other obligations bearing a fixed rate of interest far below that rate, and that the balance of the eight per cent return remaining after paying that interest would go to the holders of stock having a par value of $20,461,200, the real value of which is seven million dollars, if the easements are valued at $5,000,000 or $2,000,000 if they are excluded which would necessarily be greater than an eight per cent return on the value of that stock.

But aside from that and assuming that the rate schedule will yield less than eight per cent on the actual value of all the Company's property or even less than eight per cent on the actual value of the stock that fact alone cannot characterize it as confiscatory, but other factors must be considered.

It is argued that an eight per cent return is necessary to enable the Company to borrow money at reasonable rates, and that the fact that it is limited to a rate schedule which will yield a return of only 6.26% puts it at a disadvantage as a borrower and weakens its credit. But the evidence fails to support that contention. It is true that there is in the record a mass of subjective and highly conjectural tes-

timony pro and con relating to it, much of which tends to support the Company's contention, but, whilst its usefulness may be conceded, the speculative opinions of experts who are themselves interested in increasing the rate of return on similar utilities cannot be substituted for the judgment of the Commission, and accepted as a conclusive determination of the question, at least where the judgment of the Commission is based upon substantive evidence.

The value of such securities as the obligations of public utility companies depends in the main upon the security they offer as well as the rate of return which they will pay the investor. And it is quite as reasonable to assume that the fact that the ratio of the Company's funded debt to the value of its property, is as the Commission found approximately 90%, affects its credit, as the fact that it can only earn 6.26 on the value of its property.

In connection with that contention the Company asserts that the use of the automobile for the transportation of those who otherwise would use its lines has increased to such an extent, that it has reduced its net revenue to such a point, that any rate schedule indicating a return of less than 8% on the value of its property impairs the security offered investors, and lessens the confidence of the public in its financial stability, and that therefore it is entitled as of right to a schedule which will insure such a rate of return regardless of its effect on that part of the public who for one reason or other are obliged to use its lines. But, if as the Company contends, it is required to pay more for its money because of the risk resulting from the increasing competition of the private automobile, it certainly cannot expect to correct that condition by raising its rates to such a point that investors will purchase its stock as a gambling or speculative venture. Nor in fact do we see any occasion for the gloomy outlook of the Company's witnesses. It appears to be well and economically managed, and the market price of its securities indicates continued public confidence in its stability, as well as in its ability to liquidate its obligations, when and as they accrue, and from the volume of its business there is little likelihood that it will cease to be a highly productive property not only useful but essential to the city's welfare and the public convenience, and profitable to its owners, provided sufficient

allowance is made for keeping its property from depreciating.

There seems to be no question but that the private automobile is a serious competitor of the Company, and it is estimated that it carries about twenty-five per cent of those who would but for it use the street cars, and it is possible that it may make further inroads on its business, regardless of rates. In fact the Company rather repudiates the idea that rates have any substantial effect upon the volume of its traffic, but attributes its decline almost entirely to the automobile, although as a matter of common sense there must be some substantial relation between transportation rates and the volume of traffic. But irrespective of that the Company's contention ignores one very important if not controlling consideration, and that is that it is a "public" service company, and that practically speaking the substantial value of all of its property is due primarily to franchises and privileges which it has secured from the State, upon the condition, express or implied but always present, that it will give in return adequate service at reasonable rates. Those privileges include not only the right to do business and operate its lines over public highways, but also protection against any other agency offering to perform the same service in the same territory. So that when the Company contends that since conditions which neither it nor any one else can control, increase the expense of its service, that it should be permitted not only to transfer that entire burden to that part of the public who must of necessity use its lines, but to also increase its net earnings beyond a point they have ever reached, it ignores the very patent fact, that if the State withdrew from it the protection from competition by other public service companies offering the same service, which it now enjoys, its very existence would be threatened. The mere fact therefore that increasing automobile competition has made it more expensive for the Company to serve those who do use its lines, while it justifies increasing its rates to a point which will absorb the increased expense, affords no excuse for still further increasing them to a point which will not only be burdensome to the traveling public but will at the same time yield to the Company a greater return than it has

ever received, and greater than that usually received by others operating in the same field elsewhere under substantially the same conditions.

Whether a given rate is burdensome to the public, involves the question of the value of the service, and presents an extremely difficult and troublesome question, the answer to which, except in extreme cases, can only rest in the judgment of the Commission operating upon varying factors each of which is entitled to some weight, but no one of which ordinarily is controlling.

One consideration suggested is the diminished purchasing value of the dollar, the increase in wages, and the fact that wages have risen higher than the cost of living, on the theory that as the public has more money to spend, it suffers no hardship if it is required to spend more, and that by judicious management it may for that reason be brought from a five cent to a ten cent state of mind without any serious physical or mental disturbance or inconvenience. But while that theory may have a certain appeal for the Company, it is too refined and delicate for general and practical use, and although it might have a material and substantial relation to the operating expenses of the Company, it has no apparent relation to the value of its service. The fact that it cost one man three dollars to grow a bushel of wheat is no reason why a purchaser should be compelled to pay him three dollars for it, if in fact, measured by the market it is only worth two, and ordinarily the affluence of the buyer has no perceptible relation to the value of the product of the seller. Whilst not strictly analogous, recent developments in the ice business tend to illustrate the fallacy of that contention. It is a matter of general knowledge that the manufacture and sale of machines for artificial refrigeration, and the manufacture of ice in homes, has had a serious effect on the artificial and natural ice business as formerly conducted. But assuming that the ice business is a public utility and its rates subject to regulation, it would be manifestly unreasonable to allow an ice company to charge to its patrons the losses it had suffered from the inroads of competitors, by requiring them to pay rates high enough to absorb these losses.

Another factor suggetsed is that a decrease in the volume of traffic indicates that the rates are burdensome, and

there is some force in that suggestion, but the difficulty in this case lies in attributing the decline to the increase of fares. So far as the facts go, it may be due either to that or to the increasing use of the automobile. Whether it is due to one or the other is a matter of unguided conjecture. For while there is in the record a confused mass of contradictory figures relating to the effect of increased rates on the volume of traffic, it is impossible to deduce from them any definite or sound conclusion.

Nor can the value be determined by comparison, by the market, or by what it would cost an individual to obtain by a privately owned agency the same service. There is no other public agency rendering the same service with which the company can be compared, for it is protected in a monopoly, and for the same reason there is no general market by which the value of its service can be ascertained, nor would it be reasonable to measure its value by what it costs the owner of an automobile to operate it so as to give like service, because of the difference in machines and in the expense incident to their operation, and because there is no fair comparison between the operation of a private automobile and a public service corporation operated as a monopoly and for profit. So that in determining whether the rates fixed by the Commission are confiscatory we are finally remitted to a few simple realities, such as the past earnings of the Company, the returns usually received by other compabies engaged in the same business in other fields under somewhat similar conditions, the rates which the Company has voluntarily fixed for its service in the past, the decrease in the purchasing power of the dollar, and the effect which other orders of the Commission have had upon the earning power of the Company.

It may be assumed that the base fare prior to the formation of the Commission was reasonable because up to that time no complaint had been made of it by the Company and in 1900 it was fixed by an Act of the Legislature, which has never been challenged. The fare then was five cents which would be approximately equal to 8-1/3 cents to day when the decreased purchasing value of the dollar is considered, and if that were all the question would be free from difficulty, for if 5 cents was fair then the equivalent of the value which five cents had then should be fair now.

But there are other factors which affect it, such as the extension of the city fare zone so as to embrace all the new territory brought into the city by the Annexation of 1918, the effect of which was to relieve a part of the public of the burden of an extra fare possibly at the expense of the Company and certainly of the remaining part of the public, and also the fact that certain of the operating expenses of the company such as the cost of labor increased in a ratio greater than that in which the purchasing power of the dollar declined, for although speaking generally the dollar now will purchase perhaps sixty per cent of what it would in 1913 it will not purchase as much as fifty per cent of the labor which the Company could have bought with it then.

But these factors were considered fully by the Commission when it fixed the base fare at 7½ cents in 1924, and in view of that finding and of the further fact that the record does not disclose any data sufficiently specific to enable us to say that it was unlawful, we are not inclined to give them any controlling weight now, especially as the schedule fixed by the order in this case is designed to give the Company a higher return on its property than it received prior to the extensions.

It also appears that if the schedule produces the results anticipated by the Commission that the net earnings of the Company in comparison with the value of its property will be as great if not greater than at any time in so much of its history as has been called to our attention, and that it will yield a return thereon with one possible exception higher than that now received by any company engaged in the same business under conditions at all comparable to those obtaining in Baltimore and its environs, and higher, than the interest rate allowed by statute in this State, Art. 49, Sec. 1. After giving due consideration to these several factors, and to the Code Art. 23, Sec. 408, we are unable to say that the schedule of fares promulgated by the order appealed from was unlawful, unreasonable or confiscatory which permits a return of 6.26 on the value of the Company's property and it follows that so much of the opinion of the trial court as set aside that part of the order and enjoined its enforcement was in error. And that conclusion seems to be in accord with such authority as there is on the subject. In the case of Smyth vs. Ames, 169 U. S.

545, the court expressly reaffirmed and approved the statement in Covington & L. Turnpike Co. supra, to which we have referred. McCardie vs. Ind. Water Co., 272 U. S. 419, cited by appellee can scarcely be considered authority to the contrary. For aside from the fact that the decision in that case was based upon facts essentially different from those in this case, it merely held upon those facts that at that time a rate of seven per cent was not confiscatory. In respect to that question it said: "The evidence is more than sufficient to sustain the rate of seven per cent found by the Commission", and while there is a certain ambiguity inherent in that expression, it certainly did not establish the rule that anything less than seven per cent would in all cases have been confiscatory, and that is the interpretation placed upon it in the dissenting opinion of Mr. Justice Brandeis, where it is said: "To avoid the possibility of misunderstanding, I add merely that in my opinion the facts of record, considered in connection with those of which we have judicial notice, do not justify holding that rates which yield a return of less than 7 per cent would be so unreasonably low as to be confiscatory." Nor is the case of R. R. & W. H. Con. vs. Duluth Street Railway Co. 273 U. S. 625, in point. There the Commission allowed a charge of six cents, but required the Company to issue six tickets for not less than twenty-five cents. The District Court prohibited the enforcement of that rate and authorized the carrier to charge not more than six cents flat. On an appeal the Supreme Court only considered the question of whether the District Court had jurisdiction to hear the complaint, and the question of the reasonableness of the rates was not referred to.

There is certainly nothing in these cases nor in any other decision of the Supreme Court which is the final authority upon the question involved in this appeal, which is in any way inconsistent with the decision of that Court in Dayton-Goose Creek R. R. Co. vs. U. S. 262 U. S. 477, in which the court through the Chief Justice in part said:

"The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted

to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit. * * * The act fixes the fair return for the years here involved, 1920 and 1921, at 5½ per cent, and the Commission exercises its discretion to add one-half a per cent. The case of Bluefield Waterworks & Improv. Co. v. Public Serv. Commission, 262 U. S., 679, 67 L. ed. 1175, 43 Sup. Ct. Rep. 679, is cited to show that a return of 6 per cent on the property of a public utility is confiscatory. But 6 per cent was not found confiscatory in Wilcox v. Consolidated Gas Co., 212 U. S., 19, 48, 50, 53 L. ed. 382, 398, 399, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; in Cedar Rapids Gas-light Co. v. Cedar Rapids, 223 U. S., 655, 670, 56 L. ed. 594, 604, 32 Sup. Cr. Rep. 389; or in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 172, 59 L. ed. 1244, 1253, P. U. R. 1915D, 577, 35 Sup. Ct. Rep. 811. Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances."

That statement has never been modified or overruled, and so far as we are advised is still the law.

Depreciation

Assuming that a schedule of fares which will yield to the Company a return of 6.26% on the value of its property is neither confiscatory nor unreasonable as a matter of law, the next question is whether the schedule adopted by the Commission in this case will in fact yield such a return. The answer to that question necessarily involves the allowance made for the depreciation of the Company's property used in the service to which it is dedicated. It is an elementary principle not only of constitutional law, but of common right, that such a Company must be permitted to earn such an increase as will not only yield a fair return on the fair value of its property, but which will be sufficient to enable it to keep its property at a constant level of efficiency, so that it will be adequate for the public needs, and so that the value upon which the return is based will not be lessened. Anything more than that would be unjust

to the public, anything less than that would be unjust both to the public and to the Company. For the public should not be required to pay rates based upon the present value of the property if that value is to be permitted to steadily depreciate, nor, should the Company's property be consumed in the public service without adequate provision for restoring to it the equivalent of its value. So that the Company is entitled to such an allowance as will not only adequately provide for current repairs, but for depreciation due to necessary retirements, obsolescence, and the diminishing utility of property which cannot be arrested by repairs. So much is self-evident, is conceded by the parties to this appeal, and does not appear to be questioned anywhere. Knoxville etc. vs. Water Company, 212 U. S. 1, Rose's Notes.

The allowance made for current repairs under the head of maintenance does not appear to be questioned, so that the only inquiry is whether the allowance for depreciation is adequate. The Commission in fixing the fare schedule allowed 5% on the gross revenue of the Company for depreciation, and estimated that that allowance would yield $883,544 in 1928 allowing for a decrease in the volume of traffic, and its opinion indicates that in reaching that conclusion it considered the cost and not the present value of the Company's depreciable property. Unquestionably there is authority for that method of calculating a proper depreciation reserve, but in our opinion it is artificial, illogical and unsound, and ought not to be approved, and since we cannot say that proper methods would not have produced a result which would have affected the rate schedule adopted, the case should be remanded to the Commission in order that it may consider and determine the proper allowance for depreciation in accordance with rules hereinafter stated, and if necessary re-adjust the rate schedule to cover any changes it may make in that allowance.

The allowance of a given percentage on the gross income of the Company as a method for computing depreciation is said to be justified by accounting usages, but in such a case as this we are not dealing with bookkeeping customs, but with substantive rights protected by constitutional guaranties, and there seems to be no logical reason why the depreciation should not be based upon the actual value

of the property itself, rather than upon vague and conjectural inferences drawn from the money the property earns. The accuracy of such a method must be largely subjective, since there is no apparent connection or relation between the income which property yields and the depreciation resulting from its use in earning that income. It is true that it is said to have been tested by more direct and intelligible methods but if that is so such methods should have been used in the first place, and not as mere checks upon a method not justified either by law or logic. But even so, if the conclusion actually reached was proper, the fact that it was reached by improper methods, would not justify us in disturbing it, so that the more important question is whether the base of the calculations by which it was tested was itself lawful. And that depends upon whether the Commission should have based its allowance for depreciation upon the original cost of the property, or upon its present value. It actually did use cost and not present value as the basis of its conclusion, and here again it must be said that there is authority for its procedure. But in our opinion it is justified by neither law nor right reason.

In valuing the property for rate making purposes the Commission based its conclusion upon its present value and not upon its original cost, and in fact the case of Havre de Grace Bridge Co. vs. P. S. C. supra left it no alternative. But if it was essential to adopt that method for ascertaining the value of the property to which the rates were applied, it is not easy to see why it should not be adopted in estimating the amount needed to replace that property when it is worn out or becomes obsolete and worthless. If the Company paid $100,000 for property now only worth $10,000, it would be grossly unfair to the public to base its annual depreciation on its cost, and if on the other hand the Company paid $10,000 for property now worth $100,000, it would be equally unfair to it to compel it to sell that property to the public at 10% of its real value. These conclusions seem to be self evident, and while there is authority to the contrary, they are supported by the reasoning in such case as the Havre de Grace Bridge Co. v. Public Service Com. supra, Knoxville vs. Water Co., supra, and Michigan Pub. Util. Con. vs. Mich. St. Tel. Co. 228 Mich. 658, and

from the standpoint of fair play both to the Company and the Public are inevitable. To require the Company to sell its service at rates which made no provision at all for the replacement or repair of the property when worn out or obsolete, would be plain confiscation, and to require it to sell it at rates which make an inadequate provision for the return of its value when worn out or obsolete as a result of public service can be no less.

Counsel for the Commission suggest that to restore value would be to "require the financing of additions to plant, to the extent of the excess of replacement over original cost of property replaced, by the public, which would in turn have to pay a return on the capital thus required." The meaning of that suggestion is not altogether clear, but if it is that the Company is entitled to the return of any thing less than the value of its property it cannot be sustained. Money deducted from earnings to replace equipment which has become worn out or obsolete, by other equipment of the same character and the same value, adds nothing to Company's resources but merely keeps them at the same level.

In testing the result arrived at by allowing a depreciation reserve of 5% on the gross income of the Company, the Commission appears to have been largely influenced by the history of the Company during the last few years. That is it appears to have concluded that since the Company had not actually expended its entire depreciation reserve in replacement, that it must have been sufficient. But that does not follow. The mere fact that it did not spend its entire reserve on replacements is not conclusive evidence that replacements which were not made, were not needed. For the Company may have been influenced by such considerations as the condition of the money and supply markets, whether the replacements should be postponed to harmonize with contemplated changes in equipment, or whether the maintenance of a substantial reserve was necessary to financial stability, and we do not regard that as an adequate test. But in our opinion there should have been some physical inspection of the property and investigation of the probable useful life of the property as shown by the experience of this company and other Companies using similar property in the same way, and an estimate made based in part at least upon such an investigation of the probable annual de-

preciation. The Commission suggests that such a test could only be properly applied to accrued depreciation, but we see no force in that argument. If an inspection of equipment shows it to be in a fair condition of repair, and experience and judgment indicate that with reasonable care it should last for a reasonably certain time before becoming worthless, that would certainly seem to be a more reliable guide in determining its annual depreciation than the amount of money it earned, or, the fact that when similar equipment became worthless, the Company did not see fit to replace it.

The Company also takes sharp issue with the Commission on its policy in respect to obsolescence as an element of depreciation.

It is difficult because of the method of calculation adopted to determine to what extent the Commission did consider that question, except that it is clear that it did not allow for extraordinary obsolescence, and in that conclusion we are in complete accord. But ordinary obsolescence is a tangible and concrete thing, for which some allowance should be made in any estimate of depreciation in such property as that operated by the Company. Experience infallibly indicates, that as a result of social or economic changes, or the progress of science and the improvement of mechanical and electrical equipment some part of the Company's property will from time to time become out of date, and unsuited to its present needs, and should be retired. Such obsolescence is really depreciation and should be considered in any fair or reasonable estimate of the probable annual depreciation of the Company's property. Extra ordinary obsolescence however is quite another thing, and by extraordinary obsolescence we mean an extensive supersession of property used for the transmission or the generation of power, or instrumentalities used for the transportation of passengers. Such obsolescence has seldom occurred in the past and whether it will occur in the future at all, or if it does when it will occur, and how extensive it will be are all matters of unrestrained speculation and conjecture, and we know of no theory upon which any depreciation allowance could be made to cover it. If it ever does occur, it can be considered by the Commission in the light of actual facts, and such allowance and adjustments made as may be proper under the circumstances, but until it does

occur it is entirely irrelevant to any consideration of the proper allowance to be made to cover the anticipated annual depreciation in the Company's property.

The last question raised by the appeal is whether the action of the Commission in abolishing the second fare zone on the Halethorpe line was unlawful, or unreasonable. In objecting to that action the Company has used the term "confiscation" with considerable freedom and some looseness. If, as we have held, rates yielding a return of 6.26 are not confiscatory in law, then it is difficult to see how extending the city fare zone to include Halethorpe is confiscatory, for any loss occasioned by the extension is absorbed by the increased fares and does not in theory affect the rate of return, and if in fact it does affect that rate, such adjustment may be made by the Commission as actual experience shows to be necessary to enable the Company to earn a fair return on its whole property. Naturally some parts of the Company's system are more profitable than others, but that does not make it necessary to establish different fares for the different lines, varying in amount with the prosperity of the several lines. Some reliance was placed upon a supposed "City Line Standard," but the city line is a mere arbitrary invisible line of separation between political units, and the "standard" was established apparently with the consent of the Company that there might be a single fare within the city limits, and has certainly been disregarded in at least several instances. The extension to Halethorpe is not profitable, was built at a loss at the request of the inhabitants of the territory served by it, and it is intimated, upon their assurance that they would not ask that it be included in the city fare zone. It is nevertheless a part of the entire system, and the rates charged on it should be measured to some extent at least by the standards applied to other parts of the system.

The Commission found as a matter of fact that "The total distance from the center of the City that may be traveled on the Halethorpe line is a fraction more than five miles, while the single fare zones on nine other lines extending into the suburbs are longer than the two zones to Halethorpe. As pointed out by counsel, the first fare zones of six of these nine lines extend a substantial distance beyond the Baltimore City limits. Five of them have no sec-

and fare zones whatever." That finding was based upon undisputed evidence, and in our judgment afforded a substantial basis for the action of the Commission in including the entire Halethorpe line within a single fare zone, and we cannot say that it was either unlawful or unreasonable, and we will not therefore disturb that part of its order which deals with that question. N. C. Ry. Co. v. P. S. Com. 122 Md. 255.

For reasons already stated it follows that so much of the decree from which this appeal was taken as vacates that part of the order of the Commission which fixes the schedule of fares to be charged by the Company, and so much of said decree as enjoins the enforcement of that part of said Order was erroneous, but because that schedule was in part based upon an allowance for annual depreciation arrived at by unlawful and unreasonable methods and by the use of an unlawful and unreasonable basis, that part of the decree will neither be affirmed nor reversed, but the case will be remanded in order that the Commission may further consider the question of depreciation and make any changes in the rate schedule which may be necessary and requisite to yield to the Company a fair and reasonable return upon the fair value of its property. And so much of the decree as affirms that part of the Order which extends the first fare zone of the Halethorpe Line to the terminus thereof, will be affirmed.

Decree affirmed in part and reversed in part and case remanded for further proceedings in accordance with the views expressed in this Opinion, each party to pay one half the costs.

In Court of Appeals of Maryland

[Title omitted]

Concurring Opinion—Filed July 23, 1928

Adkins, J., filed the following separate concuring opinion:

It will probably be thought a work of supererogation for one who agrees with the conclusions reached in the able

opinion written by Judge Offut for the Court to file a concurring opinion. When the opinion is read as a whole there should be no misconception as to its meaning so far as any expressions therein are necessary to the conclusions. But it is always possible in reading detached expressions and considering them out of their setting to attribute to them a bearing not intended by the writer or by the Court.

For that reason, and to make my own position clear, I file this memorandum, in which I desire to state what I understand to be the meaning of Judge Offut and of the Court as to the matters herein referred to.

It was not intended, as I understand, to suggest that there is anything in the record to indicate that a ten cent fare would be more than the service is worth if such a fare should be found necessary to pay for the cost of the service and to give the company a fair return on the value of its property.

Nor, as I understand, was it intended to indicate that a finding of the Commision as to the proper amount to be allowed annually for accruing depreciation would be conclusive and unreviewable, even though the commission should base that finding on present value rather than the original cost, if the amount so found should be manifestly unreasonable on the whole evidence. Here, the question of confiscation is involved; and in any hearing by a Court on such a question it must be satisfied, not necesarily that it would have reached the same conclusion on the evidence, but, at least, that the conclusion reached by the commission was fairly deducible from the evidence. The opinion clearly indicates the kind of evidence on which a finding as to depreciation should be based.

There are some expressions in the opinion with which I am not in full accord, but they are not necesary to the conclusions reached. For instance, I do not agree with all that is said in what is designated in the opinion as the third method of approach to the question whether the schedule of fares authorized by the Commission is confiscatory within the meaning of the State and Federal Constitutions, or unlawful and unreasonable within the meaning of the statute creating the Commission.

True Copy. Test: James A. Young, Clerk of the Court of Appeals.

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

DISSENTING OPINION BY CHIEF JUDGE BOND—Filed Aug. 2, 1928

I concur in what Judge Parke has written, but would add these remarks in elaboration of some portions of it. It seems to me that so long as the present equipment and service of the utility are necesary to the public, it is a mistake to say that the ordinarily fair return on that property may be pared down at all merely because there were formerly more riders for it, more profitably distributed. The fair return on a utility property, for the service rendered with it, is to be calculated on present conditions only. The Supreme Court of the United States has said that the problem of a fair return is a problem of day by day, month by month, and year by year, as service continues. Denver v. Denver Water Co., 246 U. S. 178, Detroit United Ry. v. Detroit, 248 U. S. 429, I take it that if a new owner , a purchaser at a sale, for instance should offer to meet the existing need with the same or similar equipment, he could not be denied the ordinary fair return on property of such value merely because conditions were better at some previous time. Another and different situation would be presented if it could be found as a fact that this sort of service cannot get the fair return because the service would not be worth so much to users; but I do not see the foundation for that finding in this case. The evidence given on the point goes only so far as to predict that a fare of ten cents would keep away two per cent of the present users. And, beyond that testimony, if the full fair return requires a fare of so much, ten cents, comparison of that amount with prices generally paid for other services, bus fares, for instance, or fares of steam or interurban electric railways for similar mileage, or prices paid for cheap commodities and entertainments, seems to me to render it impossible to say that it is more than street railway transportation for an average of some miles is worth to riders.

Judge Parks authorizes me to add that these views are in accordance with his own.

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

DISSSENTING OPINION OF JUDGE PARKE—Filed Aug. 2, 1928

While agreeing with the conclusions of the Court that the Commission's method of determining the depreciation reserve was improper and that its order abolishing the second fare to Halethorpe was not unlawful, the writer believes the limitation of the rate of return to 6.26 per centum was unlawful and that the conclusions reached by the trial Judge were substantially correct.

As was declared in the Railroad Commission Cases, 116 U. S. 307, at p. 331, "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." If a public utility is deprived by a rate regulation of the right to receive a fair return upon the fair value of its property used in the public service, its property is confiscated, and the regulation is void, whether enacted by a legislative assembly or imposed by a commission pursuant to delegated authority. The determination of the constitutionality of a rate "depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two—pure matters of fact," as was said by Mr. Justice Holmes in Prentis vs. Atlantic Coast Line, 211 U. S. 210, 228. To adjudicate the value of the property of a public utility or to determine its earning capacity, or the resultant return upon this value of a proposed rate is essentially the exercise of a judicial function; and, for that reason, the statute provides for a review by the court in order that the owners of a utility be not deprived of their property without due process of law. Minnesota Railroad Commission Cases, 134 U. S. 418, 457; Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362; Ohio Valley Co. vs. Ben Avon Borough, 253 U. S. 287. And this constitutional right to a judicial hearing in rate-making

cases embraces not merely questions of law but also questions of fact, which are generally controlling. Supra.

So, the statute provided for a judicial inquiry by an action at law "to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is unlawful, or that any such regulation, practice, act or service fixed in such order is unreasonable." Code, Art. 23, sec. 404. The mere provision for judicial review is sufficient to demonstrate that the findings of fact by the Commission are not made conclusive; and the statute deals with the point and makes the "determination, requirement, direction or order of the commission complained of" only prima facie correct by providing that "the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful, as the case may be." Code, Art. 23, sec. 408; Public Service Comm. vs. Byron, 153 Md. 464, 470, 471, 479 et seq.

These provisions of the statute impose upon the court the duty of weighing and adjudging the facts upon which the unlawfulness or unreasonableness of the Commission's findings in the instant case depends, and, therefore, the Court cannot accept as final any determination of fact involved in the present controversy but only give it the prima facie presumption of correctness, so where the court thus finds from the facts that the action of the commission was either unlawful or unreasonable, it is not only the province but the plain and imperative duty of the court so to decide.

It is held by the Commission that the subsisting street railway service is a method of transportation whose maintenance is necessary in the public interest, carrying more passengers during the hours of peak load than ever before in its long history. The present system is, therefore, far from being moribund. So, whatever the risks of its urban business, none is greater than its operation under less than a fair rate of return and the uncertainty that this ruinous situation will be surely, timely and adequately relieved. A failure to grant such relief invites disaster; and stinted

relief often simply delays a crisis which when it arrives will prove immediately disastrous to the owners of the utility and, in the end, to the interests of the public. The position of the utility is made graver, and the public will not ultimately be benefited by the ruling in the pending case since, in the opinion of the writer of this dissent, the weight of the evidence clearly and satisfactorily establishes that the Commission's limitation of the fair rate of return to 6.26 per centum of the value of its property is confiscatory and, so, unlawful. Bluefield Company vs. Public Service Commission, 262 U. S. 679, 694-695.

Where the service rendered by the public utility is necessary, the owners of the utility are entitled to a return which will cover the expenses of operation and a fair return upon the property used. The right to compensation is fundamental since the property used represents capital invested, and since the continued existence of the utility depends upon the ability to sustain its credit and to procure its capital requirements from time to time, a fair return on the property used means such a return as will induce capital to supply these financial demands. Capital is the most fluid and independent of commodities and none is more subject to the law of competition; and the rate at which money is borrowed is the best index of the financial position and condition of the borrower. Under existing circumstances, the utility can not find a market for preferred or common stock in order to obtain money for capital expenditures, and it has been compelled to procure funds through the issue of bonds and short term notes. In the opinion of the Court is found a table showing the cost to the utility of slightly over $18,000,000.00 of money borrowed from July 1st, 1920, to March 1st, 1927, on bonds and securities. The average cost was 7.23 per centum. The lowest cost was 6.6 per centum for money borrowed in 1922 on bonds. The last loan was on March 1st, 1927, when $2,000,000.00 of three years 6 per centum gold notes were issued at a cost to the utility of 7.32 per centum. Without a sufficient supply of capital there can be no efficient nor economical administration of a municipal street railway system; and the onerous cost of these borrowings reflects the extent to which the credit of the utility has been impaired by insufficiency of the revenues of the Company and

the uncertainty of its being allowed an increased rate of return on the value of the property which it employs for the public convenience. It would seem inevitable that a fair return on the property should be more than the cost of money obtained through the sale of bonds and other securities. McCardle vs. Indianapolis Water Co., 272 U. S. 400, 419, 420. The clear and convincing testimony in this case is that a basic rate of 6.26 per centum is not a fair return upon the property used, nor sufficient to enable the utility to maintain its credit or to secure its necessary capital at a reasonable cost. This evidence cannot be denied its legal effect by comparing the fares and rates of return allowed to street railway utilities of other municipalities of similar size, where the local conditions and hazards are different and a park tax equivalent to one-half a cent for every fare is not added. Such evidence is entitled to some weight in considering the lawfulness of the rate of return in question, but it is obvious that its value is slight when so much depends upon the circumstances of every case and the nature and method of determining the rate base upon which the return is allowed.

It follows that this testimony cannot prevail over the clear and satisfactory evidence on the part of the utility that a rate of return of 6.26 per centum is not compensatory and that the case should have been remanded to the Commission to ascertain a rate which would not be confiscatory. Public Ser. Comm. vs. N. C. Ry. Co., 122 Md. 355, 389, 390.

IN COURT OF APPEALS OF MARYLAND

HAROLD E. WEST, Chairman, and J. FRANK HARPER and STEUART PURCELL, Members, Constituting the Public Service Commission of Maryland, Appellants,

vs.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, Appellee.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, Appellant,

vs.

HAROLD E. WEST, Chairman, and J. FRANK HARPER and STEUART PURCELL, Members, Constituting the Public Service Commission of Maryland, Appellees

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Aug. 25, 1928

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland:

The petition of The United Railways and Electric Company of Baltimore, a body corporate, appellee and cross-appellant in the Court of Appeals of Maryland, plaintiff in the Circuit Court No. 2 of Baltimore City and hereinafter called "plaintiff," respectfully shows:

1. That as fully appears from the record in this cause, this cause is and was in the Circuit Court No. 2 of Baltimore City and in the Court of Appeals of Maryland a suit where was drawn in question the validity of certain statutes of the State of Maryland, viz., statutes relating to the Public Service Commission of Maryland and a certain order and/or orders of the Public Service Commission of Maryland purporting to have been made pursuant to said statutes, on the ground of said statutes (including said order and/or orders) being repugnant to the Constitution of the United States, and the final decree of the Court of Appeals of Maryland made and entered in said cause on July 16, 1928, was and is a decision in favor of the validity of said statutes (including said order and/or orders).

2. Your petitioner, for the reasons specified in the assignment of errors which is filed herewith, conceives itself aggrieved by said final decree made and entered by the Court of Appeals of Maryland on July 16, 1928.

Wherefore your petitioner prays that an appeal may be allowed herein from the Court of Appeals of Maryland to the Supreme Court of the United States and that an order may be passed fixing the amount of the bond on said appeal.

Venable, Baetjer & Howard, Haman, Cook, Chesnut & Markell, Henry H. Waters, Counsel for the United Railways and Electric Company of Baltimore, Appellant.

And now, to wit, on August 25th, 1928, it is ordered that an appeal from the Court of Appeals of Maryland to the Supreme Court of the United States be allowed as prayed, upon the filing of a bond in the sum of five hundred dollars ($500) with good and sufficient security and Fidelity and Deposit Company of Maryland is accepted as surety on said bond and said bond is now approved.

Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland.

IN COURT OF APPEALS OF MARYLAND

[Titles omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 25, 1928

Now comes The United Railways and Electric Company of Baltimore, a body corporate, appellee and cross-appellant in the Court of Appeals of Maryland, plaintiff in the Circuit Court No. 2 of Baltimore City and hereinafter called "plaintiff," and for its assignment of errors shows:

1. That the Court of Appeals of Maryland erred in not affirming the decree of the Circuit Court No. 2 of Baltimore City in so far as said decree adjudged and decreed that the rates fixed by the Order No. 12639 of the Public Service Commission of Maryland passed on February 10, 1928, and said order and prior orders limiting rates charged by the

plaintiff are unconstitutional and fail to allow to the plaintiff a fair return on the fair value of its property, (i. e., they deprive the plaintiff of its property without due process of law, contrary of the Fourteenth Amendment of the Constitution of the United States) and vacated and set aside said Order No. 12639 in so far as the same purports to limit the rates of the plaintiff and enjoined the defendants (appellants and cross-appellees in the Court of Appeals of Maryland, defendants in the Circuit Court No. 2 of Baltimore City and herein called "defendants") against enforcing against the plaintiff the provisions of said Order No. 12639, or any prior orders, in so far as the same limit or purport to limit the rates of fare to be charged by the plaintiff.

2. That the Court of Appeals of Maryland erred in not holding that a schedule of fares which permits the plaintiff to earn a return of not more than 6.26 per cent. on the fair value of its property is confiscatory and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in holding that Order No. 12639 of the Public Service Commission of Maryland and the schedule of rates fixed thereby, (with only such increases in said fares as may be necessary and requisite to yield to the plaintiff a return of 6.26 per cent. upon the fair value of its property,) are not confiscatory and do not deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

3. That the Court of Appeals of Maryland erred in holding that the question whether fares which permit a return of only 6.26 per cent. are confiscatory "must be approached * * * from the standpoint of the State" and in such approach "factors * * * such as the nature and necessity of the service, the effect of its continuance or withdrawal, both upon the security holders of the corporation, and upon property values, and the welfare of the people in the territory served by it, the extent to which the State itself is a partner in the enterprise, and the circumstances and conditions under which the (plaintiff) acquired and exercises its franchises and privileges may become of paramount and controlling importance"; thus holding that, under the guise of "approaching" the question what is a fair

return and giving weight to various "factors" in the question, the question may actually be ignored and evaded and supplanted by various so-called "factors" which do not properly control or affect the question at all.

4. That the Court of Appeals of Maryland erred in holding that the plaintiff's constitutional right to a fair return on the fair value of its property affords no excuse for "increasing (its rates) to a point which will not only be burdensome to the traveling public but will at the same time yield to the (plaintiff) a greater return that it has ever received, and greater than that actually received by others operating in the same field elsewhere under substantially the same conditions" (*i. e.*, under confiscatory rates), and that "whether a given rate is burdensome to the public involves an extremely difficult and troublesome question, the answer to which, except in extreme cases, can only rest in the judgment of the Commission operating upon varying factors each of which is entitled to some weight, but no one of which ordinarily is controlling," thus holding that private property embarked in a utility business does not "rest secure under the constitutional protection which extends * * * to the right to receive just compensation for the service given to the public" (The Minnesota Rate Cases, 230 U. S. 352, 434) but that this constitutional protection "can rest only in the judgment of the Commission" and that past confiscation of the plaintiff's property and present confiscation elsewhere legalize perpetual confiscation of the plaintiff's property.

5. That the Court of Appeals of Maryland erred in holding that "in determining whether the rates fixed by the Commission are confiscatory we are finally remitted to a few simple realities, such as the past earnings of the Company, (to which the Court of Appeals gives effect precisely the opposite of that given by the Supreme Court of the United States), the returns usually received by other companies engaged in the same business under somewhat similar conditions (i. e., under confiscatory rates), the rates which the (plaintiff) has voluntarily fixed for its service in the past, the decrease in the purchasing power of the dollar, and the effect which other orders of the Commission have had upon the earning power of the (plaintiff)", but that the last two of these factors (regarded by the Court

of Appeals as tending to support the plaintiff's position) "were considered fully by the Commission when it fixed the base fare at 7½ cents in 1924, and in view of that finding and of the further fact that the record does not disclose any data sufficiently specific to enable us to say that it was unlawful, we are not inclined to give them any controlling weight now"; thus holding (1) that the question whether rates are confiscatory may be determined from "simple realities" which do not properly affect the question at all and (2) that on this question of confiscation a previous rate order is (unless now specifically proved to have been unlawful) res judicata as to facts then considered by the Commission, although (a) commission rate orders do not so operate and (b) this 1924 rate order could not so operate because the value of the plaintiff's property had not then been determined at all and in that case the question of confiscation could not be and was not determined by the Commission and the Commission's own views were expressly tentative, pending determination of the value of the plaintiff's property.

6. That the Court of Appeals of Maryland erred in not holding that failure of a State to "provide a fair opportunity for submitting" the question of confiscation "to a judicial tribunal for determination upon its own independent judgment as to both law and facts" is a deprivation of liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in holding that the Supreme Court of the United States (in so holding) did not mean what it said but meant precisely the opposite.

7. That the Court of Appeals of Maryland erred in confusing the opinion of the Supreme Court in McCardle vs. Indianapolis Water Works Co., 272 U. S. 419, with the dissenting opinion, treating the dissenting opinion as an "interpretation" instead of a negation of the Court's opinion, and thus acting on that case as not deciding what it very clearly did decide, viz., that on the evidence therein and the authority of recent decisions in other cases, rates yielding a return of less than 7 per cent would be confiscatory.

8. That the Court of Appeals of Maryland erred in holding that decisions of the Supreme Court of the United States that certain utilities are entitled to certain returns on the value of their properties "are uniformly found to be based upon facts peculiar to the several cases" and in the instant case the Court of Appeals "is little aided by what" the Supreme Court "may upon different facts have found to be lawful or confiscatory, fair or unreasonable rates."

9. That the Court of Appeals of Maryland erred (while properly holding that the schedule of fares fixed by Order No. 12639 of the Public Service Commission of Maryland was based upon an allowance for annual depreciation arrived at by unlawful and unreasonable methods and by the use of an unlawful and unreasonable basis, viz., the basis of costs of the plaintiff's depreciable property instead of the proper basis, its present value), in nevertheless refusing to vacate or set aside, or enjoin enforcement of, said order or said schedule of fares, although the fact is and the evidence abundantly shows without substantial evidence to the contrary, and the Court of Appeals in effect so holds or recognizes, that the present value of the Plaintiff's depreciable property is substantially in excess of cost, the Commission's allowance for annual depreciation based on cost is grossly inadequate and the schedule of fares based on said allowance is grossly inadequate to yield even a return of 6.26 per cent. (erroneously held by the Court of Appeals to be sufficient to escape confiscation) and therefore is confiscatory and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

10. That the Court of Appeals of Maryland erred (while properly holding that, because by said Order No. 12639 the annual allowance for depreciation is based on cost, instead of the present value, of the plaintiff's depreciable property and therefore is inadequate, the schedule of fares fixed by said order is inadequate to yield even a return of 6.26 per cent on the fair value of the plaintiff's property and is confiscatory and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States) in never-

theless refusing to vacate or set aside, or enjoin enforcement of, said order or said schedule of fares.

11. That the Court of Appeals of Maryland erred (when holding that Maryland statutes deprive all Maryland courts of the right and power to enjoin enforcement of confiscatory rate orders, thereby deprive the plaintiff of all judicial remedy against the enforcement of confiscatory rate orders, and in lieu of all judicial remedy merely remand the plaintiff for relief against confiscation to the confiscators themselves) in not holding that Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

12. That the Court of Appeals of Maryland erred (when holding that by reason of Maryland statutes, one confiscatory rate order might be vacated by the Courts, leaving prior orders still more confiscatory in force, but all unconstitutional orders can not be vacated by the Courts, thus holding that the Courts can protect constitutional rights against one unconstitutional order but, when all orders are unconstitutional, can only remand the plaintiff to further action by the confiscators) in not holding that the Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

13. That the Court of Appeals of Maryland erred (when holding that Maryland statutes not only empower the Public Service Commission to regulate the plaintiff's rates but also deprive the plaintiff of its constitutional right, subject to regulation, to initiate and make rates) in not holding that Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

14. That the Court of Appeals of Maryland erred (when holding that even the fact that all Commission rates are confiscatory does not "authorize * * * the (plaintiff) to fix" its own rates (subject to the continuing power of regulation) or the Courts to set aside all unconstitutional

Commission orders and "leave the question of rates * * * to the discretion of the (plaintiff)" (subject to regulation), but "under the statute the power to (fix rates) is in the Commission alone") in not holding that the Maryland statute, so construed and applied, makes the Commission "the financial manager" of the plaintiff and clothes the Commission "with the general power of management incident to ownership" (Southwestern Tel. Co. v. Public Service Commission, 262 U. S. 276, 289) and thereby deprives the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

15. The Court of Appeals of Maryland erred in not reversing the decree of the Circuit Court No. 2 of Baltimore City in so far as said decree dismissed the plaintiff's bill of complaint as to that portion of Order No. 12639 of the Public Service Commission of Maryland which extended the first fare zone on the plaintiff's Halethorpe line to the terminus of said line at Halethorpe, and in not adjudging and decreeing that said portion of said order is unconstitutional and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in not vacating and setting aside said portion of said order and enjoining the defendants against enforcing the provisions of said portion of said order.

Wherefore the plaintiff prays that the said decree of the Court of Appeals of Maryland made and entered on July 16, 1928, be reversed and that said Court may be directed to enter a decree in favor of the plaintiff.

Venable, Baetzer & Howard, Haman, Cook, Chesnut & Markell, Henry H. Waters, Counsel for the United Railways and Electric Company of Baltimore, Appellant.

Bond on Appeal for 500.00, approved and filed August 25, 1928, omitted in printing.

Citation, in usual form, showing service on Thomas J. Tingley et al., filed August 25, 1928, omitted in printing.

IN COURT OF APPEALS OF MARYLAND

[Titles omitted]

PETITION FOR CROSS-APPEAL AND ORDER ALLOWING SAME —Filed Sept. 19, 1928

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland:

The petition of Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, appellants and cross-appellees in the Court of Appeals of Maryland, defendants in the Circuit Court No. 2 of Baltimore City, and hereinafter called Commission, respectfully shows:

(1) That, as fully appears from the record in this case, this case is, and was in the Circuit Court No. 2 of Baltimore City, and in the Court of Appeals of Maryland, a suit where was drawn in question by the United Railways and Electric Company of Baltimore, hereinafter called Company, the validity of a certain order and/or orders of the Public Service Commission of Maryland, on the ground of the same being repugnant to the Fourteenth Amendment to the Constitution of the United States.

(2) The validity, in particular, of Order No. 12,639 of the Commission, passed February 10, 1928, was drawn in question, on the ground that the said Order established rates to be charged by the Company for street railway service in Baltimore City and vicinity, which resulted in a rate of return of 6.26 per cent, to the said Company, which rate of return, it was alleged, would be confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States; and on the further ground, inter alia, that the Commission, in fixing the said rates, calculated the annual depreciation allowance granted to the Company so as to restore the original cost of property consumed or retired in service, rather than the pres-

ent day value of such property, which action was also alleged by the Company to be confiscatory within the prohibition of the said Amendment. The rates in question, fixed by the said order of the Commission, were a cash fare of nine cents, with three tokens for twenty-five cents.

(3) The Court of Appeals of Maryland held that the rate of return estimated to result from the said rates of fare was not confiscatory, but further held that the action of the Commission in restoring through the annual depreciation allowance of the Company the cost of depreciable property rather than its present day value, as above, was confiscatory, and hence that the Company might not be actually receiving the return of 6.26 per cent, estimated by the Commission to be yielded by the rates established as above. The Court of Appeals accordingly remanded the case, with directions to the Commission to further consider the question of depreciation, investigate the property of the Company with a view to the determination of its condition and profitable life, and if necessary, readjust the rate schedules to reflect any increased amount which might be found necessary, in order to restore to the Company the present day value, rather than cost, of property consumed or retired in service.

(4) This decree of the Court of Appeals of Maryland was passed on July 16, 1928. Thirty days thereafter the mandate of the Court of Appeals was directed to and received by the Circuit Court No. 2 of Baltimore City, which Court on August 31st, 1928, entered an order remanding the case to the Commission for further proceedings as directed by the Court of Appeals.

(5) The Company, on August 25, 1928, secured an order from the Chief Judge of the Court of Appeals of Maryland allowing an appeal from the portions of the said decree of the Court of Appeals, adverse to its contentions, including therein the contention that the rate of return estimated to be yielded by the rates fixed by the defendants is confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States, that the action of the Court, in not vacating, setting aside or enjoining the rates fixed by the Comission, instead of

remanding the case, in view of its finding as to the proper basis for the annual depreciation allowance, is also confiscatory; and that the action of the Court in sustaining the defendants with respect to a provision of their order directing the extension of the single fare zone to the community of Halethorpe, situated beyond the City limits of Baltimore, was also confiscatory.

(6) That the question of whether cost or value of property consumed or retired in service should be restored through the annual depreciation allowance fixed for the Company, is an integral and indispensable part of the present case, and of the decree entered by the Court of Appeals therein, and that the case cannot be properly or adequately considered without determining it, and that the decree of the Court of Appeals of Maryland is single and inseverable, and can not properly be reviewed without consideration of that question.

(7) The Commission has already ordered an investigation of the condition of the property of the Company, pursuant to the direction of the Court of Appeals, and has by order directed that further proceedings be held, beginning on the 15th day of November, 1928, to determine the proper amount to be allowed the Company for depreciation, pursuant to the direction contained in the decree of the Court of Appeals. Any increase in fare resulting from these hearings will affect the amount of revenue received by the Company and, if the basis for fixing the depreciation allowance determined by the Court of Appeals be erroneous, will affect the rate of return received by it.

(8) The Commission is advised and believes that the decree of the Court of Appeals of Maryland, properly construed, determines that it is confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States for the Commission to so calculate the Company's annual allowance for depreciation as to restore the cost, rather than the present day value, of property consumed or retired in service, and hence determines a Federal question of substance not theretofore determined by the Supreme Court of the United States, in a manner not in accord with the decisions of that Court in cases involving related questions, and unsound and untenable, and in conflict with the trend of authorities.

(9) Your petitioners, for the reasons specified in the assignment of errors which is filed herewith, conceive themselves aggrieved by the said final decree made and entered by the Court of Appeals of Maryland on July 16, 1928, in so far as the same determines that the restoration through the annual depreciation allowance to the Company of the cost, rather than the present day value, of its property, consumed or retired in public service, is confiscatory, within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

Wherefore your petitioners pray that a cross-appeal may be allowed herein from the Court of Appeals of Maryland to the Supreme Court of the United States and that an order may be passed fixing the amount of the bond on said cross-appeal.

Thomas J. Tingley, Raymond S. Williams, Counsel for Harold E. West, Chairman, et al., Constituting the Public Service Commission of Maryland, Cross-appellants.

Order

And now, to wit, on September 19th, Nineteen Hundred and Twenty-eight, it is ordered that an appeal from the Court of Appeals of Maryland to the Supreme Court of the United States be allowed as prayed, upon the filing of a bond in the sum of Five hundred dollars ($500), with good and sufficient security and United States Fidelity and Guaranty Company is accepted as surety on said bond and said bond is now approved.

Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland.

Service of a copy of the within Petition for Cross Appeal is hereby Admitted this 19th day of September 1928.

Herman, Cook, Chesnut & Markell, Venable, Baetjer & Howard, Counsel for United Railways & Electric Company of Baltimore, Cross-Appellee.

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS ON CROSS-APPEAL OF HAROLD E. WEST ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND—Filed Sept. 19, 1928

Now come Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, appellants and cross-appellees in the Court of Appeals of Maryland, defendants in the Circuit Court No. 2 of Baltimore City, and hereinafter called Public Service Commission of Maryland, and for their assignment of errors show:

1. That the Court of Appeals erred in not reversing the decree of the Circuit Court No. 2 of Baltimore City, insofar as said decree adjudged and decreed that the annual depreciation allowance of the United Railways and Electric Company of Baltimore, fixed by the Order No. 12,639 of the Public Service Commission of Maryland, passed on February 10, 1928, should be calculated to restore to the said Company the present value of its depreciable property, and that calculating said allowance so as to restore to the Company the cost of its depreciable property, (as was done by the said Commission in the said order), was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

2. That the Court of Appeals of Maryland erred in holding that the annual depreciation allowance of The United Railways and Electric Company of Baltimore, fixed by the Order No. 12,639 of the Public Service Commission of Maryland, passed on February 10, 1928, so as to restore to the Company the cost of its depreciable property, and not the present value thereof, was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Wherefore the Public Service Commission of Maryland prays that the said decree of the Court of Appeals of Mary-

land made and entered on July 16, 1928, be reversed and that said Court may be directed to enter a decree in favor of the Public Service Commission of Maryland.

Thomas J. Tingley, Raymond S. Williams, Counsel for the Public Service Commission of Maryland, Cross-appellants.

Service of a copy of the within Assignment of Errors on the Cross-Appeal of the Public Service Commission of Maryland is hereby admitted this 19th day of September, 1928.

Haman, Cook, Chesnut and Markell, Venable, Baetjer and Howard, Counsel for United Railways and Electric Company of Baltimore, Cross-appellee.

Bond on cross apepal for $700.00, approved and filed Sept. 19, 1928, omitted in printing.

Citation, in usual form, showing service on Harmon, Cook, Chesnut & Markell et al., field September 19, 1928, omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 464, No. 465

STIPULATION AS TO PRINTING RECORD—Filed Sept. 22, 1928

In lieu of designation and counter-designation by the respecive parties to the above appeal and cross-appeal of the parts of the record to be printed, it is hereby stipulated and agreed as follows:

Both parties to the above appeal and cross-appeal state that in their opinion the whole of the record as filed is neces-

sary for the consideration of the two cases, that said record has been printed and used upon the hearing in the Court below, viz., the Court of Appeals of Maryland, that twenty-seven (27) copies of said record as printed for use in the Court of Appeals of Maryland have been transmitted to the Clerk of the Supreme Court of the United States and that said copies so printed may be used by the Clerk of the Supreme Court of the United States in the preparation and as a part of the printed record of the Supreme Court of the United States in both the above entitled cases, viz., the above appeal and the above cross-appeal.

Chas. McH. Howard, Chas. Markell, Counsel for the United Railways and Electric Company of Baltimore, Appellant and Cross-appellee. Raymond S. Williams, Counsel for Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, Constituting the Public Service Commision of Maryland, Appellees and cross-appellants.

[File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 464

STATEMENT OF POINTS TO BE RELIED UPON—Filed Sept. 22, 1928

Comes now The United Railways and Electric Company of Baltimore, the appellant in the above entitled cause, and adopts its assignments of error as the points upon which it intends to rely in this Court in said cause.

Chas. McH. Howard, Chas. Markell, Counsel for the United Railways and Electric Company of Baltimore, Appellant.

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 464

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, Appellant,

vs.

HAROLD E. WEST, Chairman, and J. FRANK HARPER and STEUART PURCELL, Members, Constituting the Public Service Commission of Maryland, Appellees

Service of copy of within designation of points to be relied on admitted this 22nd day of Sept. 1928.
Raymond S. Williams, Counsel for Public Service Comm. of Md., Appellees.

[File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 465

STATEMENT OF POINTS TO BE RELIED UPON—Filed Sept. 22, 1928

Come now Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, cross-appellants in the above entitled cause, and adopt their assignments of error as the points upon which they intend to rely in said cause.

Raymond S. Williams, Counsel for Harold E. West et al., Constituting the Public Service Comission of Maryland, Cross-appellants.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 465

HAROLD E. WEST, Chairman, and J. FRANK HARPER and STEUART PURCELL, Members, Constituting the Public Service Commission of Maryland, Cross-Appellees

vs.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, Cross-appellee

Service of copy of within designation of points to be relied on admitted this Twenty Second day of September, Nineteen Hundred and Twenty-Eight.

Charles McHenry Howard, Chas. Markell, Counsel for the United Railways and Electric Company of Baltimore, Cross-appellee.

[File endorsement omitted.]

Endorsed on cover: File Nos. 33,773, 33,774. Maryland Court of Appeals. Term No. 464. The United Railways and Electric Company of Baltimore, appellant, vs. Harold E. West, chairman, and J. Frank Harper and Steuart Purcell, members, constituting the Public Service Commission of Maryland. Term No. 465. Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, Constituting the Public Service Commission of Maryland, appellants, vs. The United Railways and Electric Company of Baltimore. Filed September 21st, 1928. File No. 33,773, 33,774.

1077

Record - - No. 7

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

vs.

HAROLD E. WEST ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND.

JOSEPH C. FRANCE,

HENRY H. WATERS,

EMAN, COOK, CHESNUT & MARKELL,

VENABLE, BAETJER & HOWARD,

For Appellant.

THOMAS J. TINGLEY,

RAYMOND S. WILLIAMS,

For Appellee.

For Prior Proceeding See Court of Appeals Record No. 52, April Term, 1923.

IN THE

Court of Appeals

OF MARYLAND.

APPEAL FROM THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY.

APPEAL TO THE APRIL TERM, 1923, OF THE COURT OF APPEALS OF MARYLAND.

Filed January 29th, 1923.

Press of
THE DAILY RECORD COMPANY
1002 East Baltimore Street
Baltimore, Md.

1678

TRANSCRIPT OF RECORD

FROM THE

CIRCUIT COURT NO. 2 OF BALTIMORE CITY

IN THE CASE OF

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

VS.

HAROLD E. WEST, ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

TO THE

COURT OF APPEALS OF MARYLAND.

For Prior Proceedings, See Court of Appeals Record No. 52, April Term, 1928.

JOSEPH C. FRANCE,
HENRY H. WATERS,
HAMAN, COOK, CHESNUT & MARKELL,
VENABLE, BAETJER & HOWARD,
For Appellant.

THOMAS J. TINGLEY,
RAYMOND S. WILLIAMS,
For Appellee.

DOCKET ENTRIES.

J. C. France
Henry H. Waters
Haman, Cook, Chesnut & Markell
Venable, Baetjer & Howard

The United Railways and Electric Company of Baltimore.

No. 16435 A

Thomas J. Tingley
Raymond S. Williams
"
"
"

Harold E. West, Chairman, and
J. Frank Harper and
Steuart Purcell, Members, constituting
The Public Service Commission of Maryland.

12th December, 1928—Supplemental Bill of Complaint and to have Order No. 12639 passed February 10, 1928, as amended by Order No. 13420 passed November 28, 1928, of the Public Service Commission of Maryland in so far as it purports to limit rates of the plaintiff so as to prevent said plaintiff from charging a flat fare of ten cents or from making similar increases in commutation and other special rates or from continuing the first and second zones on the Halethorpe line as they were extended on February 10, 1928, and any prior orders of the said Commission in so far as they purport so to limit the rates of the Company, etc., be declared unlawful, null and void, etc. (1) and plaintiff's Exhibits A (2) and B (3) fd.

12th December, 1928—Subpoena Issued (4) [Summoned as marked].

29th December, 1928—Appearance of Defendants by Thomas J. Tingley and Raymond S. Williams and its Answer to supplemental Bill of Complaint (5) fd.

10th January, 1929—Transcript of Record from Public Service Commission (6) fd.

10th January, 1929—Decree refusing Injunction as prayed in the Supplemental Bill of Complaint or otherwise, that vacating and setting aside order No. 12639

of the Public Service Commission of Md. as amended by Order No. 13420 or prior orders, etc., fix or limit the schedule of fares to be charged or otherwise refused and dismissing Supplemental Bill of Complaint with costs (7) fd.

10th January, 1929—Appeal prayed to the Court of Appeals of Maryland from decree of this Court dated January 10, 1929 (8) fd.

26th January, 1929—Stipulation (9) fd.

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(20)

DECREE.

(Filed 31st August, 1928.)

This cause having been heard in the Court of Appeals of Maryland and the decree of this Court having been by the Court of Appeals affirmed in part and reversed in part and this cause remanded for further proceedings in accordance with the views expressed in the opinion of the Court of Appeals, it is thereupon this 31st day of August, 1928, in accordance with the views expressed in the opinion of the Court of Appeals and pursuant to the mandate of the Court of Appeals, Adjudged, Ordered and Decreed as follows:

1. That an injunction as prayed in the bill of complaint or otherwise be and it hereby is refused, the decree of this Court enjoining the defendants having been reversed by the Court of Appeals.

2. That vacation and setting aside of Order No. 12639 of the public Service Commission of Maryland and/or prior orders of said Commission, in so far as said order and/or orders fix or limit the schedule of fares to be charged by the plaintiff, as prayed in the bill of Complaint or otherwise, be and the same hereby is refused, the decree of this Court vacating and setting aside said Order No. 12639, having been reversed by the Court of Appeals.

3. That, the schedule of fares fixed by said Order No. 12639 being in part based upon an allowance for annual

depreciation arrived at by unlawful and unreasonable methods and by the use of an unlawful and unreasonable basis, viz., the basis of cost of the plaintiff's depreciable property instead of the proper basis, its present value, the proceedings before the Public Service Commission of Maryland involved in this cause be and they hereby are remanded to said Commission with directions to further consider the question of depreciation, determine the proper allowance for depreciation in accordance with opinion of the Court of Appeals and made any change in said rate schedule which may be necessary and requisite to yield to the plaintiff a fair and reasonable return (in accordance with said opinion), upon the fair value of its property.

JOSEPH N. ULMAN.

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(1)

SUPPLEMENTAL BILL OF COMPLAINT.

(Filed 12 December, 1928.)

In the Circuit Court No. 2 of Baltimore City.

The United Railways and Electric Company of Baltimore

vs.

Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, Constituting the Public Service Commission of Maryland.

To the Honorable, the Judge of said Court:

The United Railways and Electric Company of Baltimore, a body corporate (hereinafter called the Company), brings this, its supplemental bill of complaint, against Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, members, constituting the Public Service Commission of Maryland (hereinafter called the Commission), and complaining, says:

1. The Company is a Maryland corporation and a street railroad corporation as defined in the Public Service Commission Law and owns and operates street railway property in Baltimore City and Baltimore and Howard Counties. The defendant, Harold E. West, is the chairman and the defendants, J. Frank Harper and Steuart Purcell are members of the Public Service Commission of Maryland and all constitute the Public Service Commission of Maryland.

2. Order No. 8240, passed by the Commission on May 26, 1924, fixed the Company's base rate fare at seven and one-half cents, when checks are purchased, or eight cents cash, with a four cent fare for children, school tickets at five cents and commutation tickets at special rates, and said fares were continued in effect by Order No. 10,072 passed by the Commission on March 9, 1926.

3. As is recited in the opinion of the Commission in the case hereinafter referred to, the Company "on August 1, 1927, filed with this Commission an application for an increase in the rates of fare charged by the Company from eight cents cash with two tokens for fifteen cents, to a ten cent flat rate, asserting that the existing rate of fare 'is inadequate to give a fair return on the value of your petitioner's properties devoted to the public service, and that the net income of your petitioner has constantly fallen short of the amount estimated by the Commission as necessary for good credit and satisfactory service to the public.

"The application pointed out that the revenue of the Company had been falling steadily, that taxes, wages and other items included in the cost of operation

'have increased, so that your petitioner is now confronted with an emergency which requires immediate relief, if it is to continue to perform its public service, maintain its credit and secure necessary money to provide new cars and other equipment. * * * your petitioner believes that a ten-cent fare is necessary to enable it to serve the public adequately and obtain funds necessary for the coming years to keep pace with the growing needs of the City, and obtain a fair return on the fair value of its properties.'

"The Company thereupon asked for the establishment of a flat fare of ten cents cash, half fare of five cents for children under twelve years of age, school tickets at five cents each and commutation tickets at special rates. It also asked that the Commission put into effect at once 'substantially increased fares' to meet the emergency the Company asserted it was facing by reason of its decreasing revenues, pending the establishment of permanent rates of fare.

"The application of the Company, therefore, was two fold. It asked for the establishment of an emergency rate of such amount as the Commission might regard to be sufficient, and a permanent rate of ten cents.

"The Commission first heard the application for the emergency increase, the hearings beginning on September 6, and ending September 14th. The taking of testimony occupied five days. On September 20, 1927, the Commission passed Order No. 11802 denying the application for an emergency rate of fare, on the ground that the Company had failed to show that such an emergency existed in the affairs of the Company as to warrant a temporary increase in fares [i. e., had failed to show 'that the public interest requires the establishment of substantially increased fares as temporary emergency fares'], or that such increase was 'necessary for the purpose of providing adequate and efficient service, or for the preservation of property.'

"By the same order the Commission set October 26th, as the date for beginning the hearing of the application for the permanent increase in the fare rate, the date later being changed to October 27th. The taking of testimony in this hearing occupied eleven days and three additional days were devoted to argument of counsel. The case was finally submitted on December 10, 1927."

4. As is also recited in the opinion of the Commission in the case aforesaid, "the communities and citizens of Halethorpe, Arbutus and Leeds," in Baltimore County, intervening by counsel, "alleged discrimination against the communities mentioned because the length of the ride to the center of the City, for which they are charged two fares, is less than car riders of other com-

munities receive for one fare," and asked that said communities be given a single fare instead of two fares.

5. On February 10, 1928, the Commission in the case aforesaid filed an opinion and passed Order No. 12639 (of which the opinion was made part), by which, among other things, (1) the application of the Company for the establishment of a flat fare of ten cents was denied, (2) the Company from and after midnight of February 12, 1928, and until further order of the Commission, was permitted to charge a base rate fare of eight and one-third cents when checks are purchased or nine cents cash, and five cents for children, (3) the first fare zone on the Halethorpe line was extended to the terminal at Halethorpe and (4) all other fares were continued. A copy of said opinion and order marked "Plaintiff's Exhibit A" filed herein with the original bill is hereby made a part hereof.

6. In its opinion aforesaid the Commission found, among other things, that the annual return that can reasonably be expected by the Company from the rates fixed by the order last mentioned is $4,691,606, which amount was determined on the basis of an annual allowance of only $883,544 for depreciation and retirement of property. On May 11, 1928, by the decree of this Honorable Court herein, the aforesaid Order No. 12639 was vacated and set aside in so far as the same purports to limit the Company's rates (except that as to the provision in said order extending the first fare zone on the Halethorpe line to the terminus at Halethorpe the original bill was dismissed) and enforcement of said order or any prior orders of the Commission purporting to limit the Company's rates was enjoined. On July 16, 1928, said decree of this Honorable Court was by the Court of Appeals affirmed in part and reversed in part and this cause was remanded for further proceedings in accordance with the views expressed in the opinion of the Court of Appeals. On August 31, 1928, by decree of this Honorable Court in accordance with the opinion and pursuant to the mandate of the Court of Appeals an injunction and vacation and setting aside of Order No. 12639 and prior orders of the Commission in so far as they fix or limit the Company's fares, as prayed in the original bill or otherwise, was refused, but the schedule of fares

fixed by said Order No. 12639 being in part based upon an allowance for annual depreciation (viz., the aforesaid allowance of $883,544) arrived at by unlawful and unreasonable methods and by the use of an unlawful and unreasonable basis, viz., the basis of cost of the Company's depreciable property instead of the proper basis, its present value, the proceedings before the Commission involved in this cause were remanded to the Commission with directions to further consider the question of depreciation, determine the proper allowance for depreciation in accordance with the opinion of the Court of Appeals and make any changes in said rate schedule which may be necessary and requisite to yield to the Company a fair and reasonable return (in accordance with said opinion) upon the fair value of its property.

7. Thereafter (as is recited in the opinion of the Commission hereinafter referred to) in obedience to the decree of this Honorable Court, in accordance with the opinion of the Court of Appeals, the Commission on November 19, 1928, entered upon a rehearing of the aforesaid proceedings in so far as they concerned the annual allowance for depreciation made in Order No. 12639 and the accompanying opinion filed February 10, 1928, heard additional evidence consisting of testimony of H. Carl Walf, Chief Engineer of the Commission, and Charles Nodder, Chief Auditor of the Commission, and on November 28, 1928, filed an opinion and passed Order No. 13420 (of which the opinion was made part) by which opinion the Commission found that $1,638,660 (instead of $883,544) is the proper annual amount to be allowed for depreciation, and that this allowance (being an increase of $755,116 over the previous allowance) "necessitates an increase in the rate of fare from nine cents cash or three tokens for twenty-five cents to ten cents cash or four tokens for thirty-five cents," other fares to remain as established by Order No. 12639, and by said Order No. 13420 Order No. 12639 was amended so that from and after midnight of November 30, 1928, and until the further order of the Commission the Company was permitted to charge a base rate fare of eight and three-quarter cents when checks are purchased or ten cents cash (instead of eight and one-third cents when checks are purchased or nine cents cash), and as to all

other fares Order No. 12639 was reaffirmed. As the Commission thus found, all the evidence before the Commission showed, and the fact is, said increase in rate permitted by Order No. 13430 is not more than is required to increase the Company's annual return by $755,116, viz., the amount of the increase in annual allowance for depreciation, and the increased rates permitted by Order No. 12639, as so amended by Order No. 13420, will yield the Company an annual return not more in any event than $4,691,606, the amount which the Commission in its opinion filed February 10, 1928, found could reasonably be expected from the rates fixed by Order No. 12639. A copy of said opinion and said Order No. 13420 is filed herewith as part hereof, marked "Plaintiff's Exhibit B."

8. In its aforesaid opinion filed February 10, 1928 (as modified by its aforesaid opinion filed November 28, 1928), the Commission found that the present fair value of the Company's property used in the public service is $75,000,000, and that the annual return that can reasonably be expected by the Company from the rates fixed by Order No. 12639, as amended by Order No. 13420, is $4,691,606, and amounts to a return of 6.26 per cent. on the fair value of the Company's property. The overwhelming weight of the evidence before the Commission showed there was no substantial evidence to the contrary and the fact is that the fair value of the company's said property is not less than $75,000,000, the annual return that can be expected by the Company from said rates (as increased by Order No. 13420) is not more than $4,691,606, and not more than 6.26 per cent. on the fair value of the Company's property, and an annual return of $4,691,606 or of 6.26 per cent. would be substantially less than a fair return such as the Company is entitled under the Constitution of the United States, and also under the Maryland Bill of Rights and the Public Service Commission Law, to be permitted to earn. Said Order No. 12639, as so amended by Order No. 13420, of the Commission, therefore, and any prior orders of the Commission limiting the Company to the same or lower rates, are contrary to the Fourteenth Amendment of the Constitution of the United States and to the Maryland Bill of Rights and the Public Service Commission Law and are null and void, and, so long as they are enforced, de-

prive the Company of its property without due process of law, and said orders and the rates, regulations, practices, acts and services fixed thereby are unlawful and unreasonable.

9. In each and all of the following respects Order No. 12639, (as amended by Order No. 13420), of the Commission, and the Commission's opinion made a part of Order No. 12639, (as modified by the opinion made a part of Order No. 13420), and any prior orders of the Commission limiting the Company to the same or lower rates, and the rates, regulations, practices, acts and services fixed by said orders or any of them, are unlawful, unreasonable, arbitrary, unsupported by any substantial evidence, contrary to the facts established by substantial evidence, confiscatory and contrary to the Fourteenth Amendment of the Constitution of the United States and to the Maryland Bill of Rights and the Public Service Commission Law and null and void, and so long as they are enforced deprive the Company of its property without due process of law:

(a) The maximum rates of fare which by said orders the Company is now permitted to charge and collect are grossly inadequate to provide for the necessary expenses of its public service and for the consumption of its property employed in such service and to yield a fair return upon the fair value of its property so employed.

(b) The percentage which the Commission found would be the rate of return upon the fair value of the Company's property yielded by the fares established by said order, as so amended, was adopted by the Commission as a fair rate of return solely for reasons and upon considerations that have no true relation to the fairness of a return and is a grossly inadequate rate of return to compensate the Company for the use of its property in the public service without confiscation of its property.

(c) The Commission by said order burdened the Company with a substantial loss of revenue by requiring it to abolish the second fare upon its Halethorpe line, which loss, without any compensating offset, and without any lawful reason for abolition of said fare, further diminishes the inadequate return upon the Company's property.

10. That the action of the Commission in so refusing to allow the Company to charge and collect for its service the rates of fare proposed and required by it, limiting it to the rates specified and provided in said opinion and said order of February 10, 1928, as modified and amended by said opinion and said order of November 28, 1928, and abolishing its second fare on its Halethorpe line is therefore not only unreasonable but confiscatory, unlawful and void, and constitutes a taking of the Company's property without adequate compensation and without due process of law, and will, unless the Commission be enjoined and prohibited by this Honorable Court from enforcing said order or any prior order purporting to prescribe any lower rate, result in irreparable injury and damage to the Company.

11. In view of the fact that the Company is suffering daily confiscation of its property by the operation of the Commission's orders, the Company will suffer immediate and irreparable loss and damage unless the operation and effect of said orders are immediately enjoined or restrained or suspended or stayed by this Honorable Court by a preliminary injunction or a restraining order.

To the end, therefore:

1. That the aforesaid Order No. 12639, passed February 10, 1928, as amended by the aforesaid Order No. 13420, passed November 28, 1928, of the Public Service Commission of Maryland, the defendants herein, in so far as it purports to limit the rates of The United Railways and Electric Company of Baltimore, the plaintiff herein, so as to prevent the plaintiff from charging a flat fare of ten cents or from making similar increases in comutation and other special rates or from continuing the first and second fare zones on the Halethorpe line as they existed on February 10, 1928, and any prior orders of the Commission in so far as they purport so to limit the rates of the Company, and the rates, regulations, practices, acts and services fixed by said orders or any of them in so far as they purport to limit the Company as aforesaid, be adjudged and decreed to be unlawful, unreasonable, unconstitutional, null and void and be vacated and set aside.

2. That the defendants, Harold E. West, Chairman,

and J. Frank Harper and Steuart Purcell, members, constituting the Public Service Commission of Maryland, and their respective successors in office, agents and attorneys, and all persons acting under their authority may be perpetually and also preliminarily pending this suit, restrained and enjoined from enforcing or continuing in force against the plaintiff the aforesaid Order No. 12639 (as amended by the aforesaid Order No. 13420) in so far as it purports to limit the rates of the plaintiff so as to prevent the plaintiff from charging a flat rate of ten cents or from making similar increases in commutation and other special rates or from continuing the first and second fare zones on the Halethorpe line as they existed on February 10, 1928, or any prior orders of the Commission in so far as they purport so to limit the rates of the Company.

3. And that the plaintiff may have such other and further relief in the premises as its case may reuqire.

May it please your Honor to grant unto the plaintiff the writ of subpoena directed to the defendants, Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, members, constituting the Public Service Commission of Maryland, and each of them, commanding them and each of them to be and appear in this Honorable Court on some certain day to be named therein to answer the premises and abide by and perform such order or decree as this Honorable Court may make in the premises.

And as in duty bound, your orator will ever pray.

J. C. FRANCE,

HENRY H. WATERS,

HAMAN, COOK, CHESNUT & MARKELL,

VENABLE, BAETJER & HOWARD,

Solicitors for Plaintiff, The United Railways and Electric Company of Baltimore.

State of Maryland, City of Baltimore, ss:

I hereby certify, that on this 12th day of December, 1928, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared Charles D. Emmons and made oath in due form of law as follows:

"I am the President of The United Railways and Electric Company of Baltimore, the plaintiff in the aforegoing supplemental bill of complaint. I am authorized to make this affidavit on behalf of The United Railways and Electric Company of Baltimore. I have read the aforegoing supplemental bill. I have personal knowledge of the matters and facts stated in the aforegoing supplemental bill. The matters and facts stated in the aforegoing supplemental bill are true to the best of my knowledge and belief."

CHARLES D. EMMONS.

Subscribed and sworn to before me this day of December, 1928.

As Witness my hand and notarial seal.

CHRISTOPHER E. RIELLY,

(Seal.) Notary Public.

NOTE.—

PLAINTIFF'S EXHIBIT A

Is Case No. 2648, Entitled

In the Matter of the

Application of The United Railways and Electric Company of Baltimore for the Establishment of a Permanent Rate of Fare of 10 Cents and for the Establishment of a Temporary Emergency Rate of Fare Pending the Establishment of Such Permanent Rate of Fare.

Said Exhibit printed in full in the April Term, 1928, Record Number 52, of the Court of Appeals of Maryland.

(3)

"PLAINTIFF'S EXHIBIT B."

(Filed 12 December, 1928.)

PUBLIC SERVICE COMMISSION OF MARYLAND.

In the Matter of the Application of The United Railways and Electric Company of Baltimore for the Establishment of a Permanent Rate of Fare of 10 Cents and for the Establishment of a Temporary Emergency Rate of Fare Pending the Establishment of Such Permanent Rate of Fare.

Case No. 2648

Before the Public Service Commission of Maryland.

Supplemental Opinion and Order No. 13420.

Filed November 28th, 1928.

PUBLIC SERVICE COMMISSION OF MARYLAND.

SUPPLEMENTAL OPINION

(Filed November 28th, 1928.)

Before the Public Service Commission of Maryland.

Case No. 2648.

In the Matter of The Application of The United Railways and Electric Company of Baltimore for the Establishment of a Permanent Rate of Fare of 10 Cents and for the Establishment of a Temporary Emergency Rate of Fare Pending the Establishment of Such Permanent Rate of Fare.

By the Commission:

In obedience to the mandate of Circuit Court No. 2 of Baltimore City entered August 31, 1928, in accordance with an opinion of the Court of Appeals, in the case of Harold E. West, et al., versus The United Railways and Electric Company of Baltimore, filed July 16, 1928, this Commission on Monday, November 19, 1928, entered upon a rehearing of Case No. 2648, in so far as it concerned the annual allowance for depreciation on the property of The United Railways and Electric Company of Baltimore made in the opinion and Order No. 12639 of the Commission, filed February 10, 1928.

The order of Circuit Court No. 2 of Baltimore City directed the Commission to further consider the question of depreciation, determine the proper allowance for depreciation in accordance with the opinion of the Court of Appeals, and make any change in the rate schedule which may be necessary and requisite.

In its opinion and Order No. 12639, this Commission allowed five per cent. of gross revenue as a proper amount to be set aside for depreciation upon the Company's depreciable property. The amount so estimated for the year 1928 was $883,544. This allowance of five per cent. of the Company's gross annual revenues was made first in 1912, the year in which a depreciation reserve was set up by the Company, and it has continued since. It has provided for current retirements of the Company's property at cost, and permitted the building up of a reserve, at the beginning of the year 1928, of $1,413,739. The plan of providing for retirements at cost is that followed by the Interstate Commerce Commission and the utility regulatory commissions of most of the states, and by all other utilities under the jurisdiction of this Commission.

The Commission, therefore, did not feel justified, in the circumstances, in departing from the generally observed rule of allowing depreciation on a basis of cost.

The Company's contention that value, and not cost, is the proper basis upon which to calculate depreciation was sustained both by Circuit Court No. 2 of Baltimore City and by the Court of Appeals.

In its opinion the Court of Appeals asserted that while there is authority for calculating depreciation on the basis of cost, "in our opinion it is artificial, illogical and unsound, and ought not to be approved." The Court continues:

"Since we cannot say that proper methods would not have produced a result which would have affected the rate schedule adopted, the case should be remanded to the Commission in order that it may consider and determine the proper allowance for depreciation in accordance with rules hereinafter stated, and if necessary readjust the rate schedule to cover any changes it may make in that allowance."

Later the Court declares:

"In such a case as this we are * * * dealing * * * with substantive rights protected by constitutional guaranties, and there seems to be no logical reason why the depreciation should not be based upon the actual value of the property itself, rather than upon vague and conjectural inferences drawn from the money the property earns. * * * But even so, if the conclusion actually reached was proper, the fact that it was reached by improper methods, would not justify us in disturbing it, so that the more important question is whether the base of the calculations by which it was tested was itself lawful. And that depends upon whether the Commission should have based its allowance for depreciation upon the original cost of the property, or upon its present value. It actually did use cost and not present value as the basis of its conclusion, and here again it must be said that there is authority for its procedure. But in our opinion it is justified by neither law nor right reason."

The Court directed the Commission to make a physical inspection of the property and an investigation of the probable useful life of the property as shown by the experience of this Company and other companies using similar properties in a similar way and to make an estimate, based in part at least upon such an investigation of the probable annual depreciation. This the Commission has done.

The annual amount claimed by the Company for depre-

ciation was $2,200,000. This, however, in the opinion of the Commission, provided for certain extraordinary obsolescence, which the Court of Appeals declares the Commission does not have to allow, and which it does not allow. H. Carl Wolf, Chief Engineer of the Commission, under whose direction the Commission's investigation and physical inspection of the property were made, testified that the fair amount to be allowed for depreciation, based upon the fair value of the property, is $1,687,068. Charles Nodder, Chief Auditor of the Commission, approaching the problem from another angle, that revealed by the experience of the Company as shown by its books, testified that the amount required for depreciation, based on present fair value, is $1,269,565.25.

The Commission carefully has considered all the testimony and exhibits before it in this case bearing upon the problem of depreciation, and finds that $1,638,660 is the proper amount to be allowed the Company for depreciation. This allowance is based upon the present value of the Company's depreciable property, in accordance with the Court's order, and equates to 3.6 per cent. of the amount testified to as being the value of the Company's depreciable property, $45,518.344.

In determining this allowance it is assumed that the existing practice with respect to the division between charges for maintenance and charges to the depreciation reserve will be continued.

The Commission will require that there be filed with it annually a complete report showing in such detail as it may prescribe the actual accruals to and charges against the reserve as fixed upon the basis herein provided, as well as the investment or other disposition of the funds represented by the balance in the reserve. These reports will enable the Commission to keep informed as to the status of this reserve and to take such action as may be required in the public interest in the ascertainment of the point at which the accumulations in the depreciation reserve shall be sufficient to permit the limiting of future accretions thereto to the amount of the net retirements, and the manner in which the balance in the reserve and/or interest thereon shall be used in the determination of rates of fare, counsel for the Company having

conceded the authority of the Commission in these matters.

The allowance of $1,638,660 is an increase of $755,116 over the allowance previously found, which was based upon the cost of the Company's property, and necessitates an increase in the rate of fare from 9 cents cash or three tokens for 25 cents to 10 cents cash or four tokens for 35 cents. Other fares will remain as established by Order No. 12639.

The Commission will pass an order in accordance with the findings herein stated.

ORDER NO. 13420.

Before the Public Service Commission of Maryland.

Case No. 2648.

In the Matter of the Application of the United Railways and Electric Company of Baltimore for the Establishment of a Permanent Rate of Fare of 10 Cents and for the Establishment of a Temporary Emergency Rate of Fare Pending the Establishment of Such Permanent Rate of Fare.

In accordance with the opinion of the Commission filed herein on the date hereof, which said opinion is hereby referred to and made a part hereof,

It is, this 28th day of November, in the year Nineteen Hundred and Twenty-eight, by the Public Service Commission of Maryland,

Ordered, That paragraphs (2) and (4) of Order No. 12639 entered herein by the Commission on February 10th, 1928, be and they hereby are modified and amended to read as follows:

(2) That from and after midnight of November 30th,

1928, and until the further order of the Commission, The United Railways and Electric Company of Baltimore shall be permitted to charge and collect for the transportation of persons over its several street railway lines in Baltimore City and vicinity, a base rate fare of eight and three-quarter cents when tickets or fare checks are purchased, or ten cents cash, for the conveyance of each passenger over twelve years of age, and five cents for each child between the ages of four and twelve years, between any of the points designated in the schedule of the said Company filed with the Commission pursuant to the requirements of the Commission's Order No. 8240 entered in Case No. 1682 on May 26th, 1924, or between intermediate points, in either direction, on any of such lines, except in so far as the zones of any of the said lines are hereinafter modified or changed.

(4) That during the period this Order is in effect The United Railways and Electric Company of Baltimore shall sell on its cars and at its offices and waiting rooms tickets or fare checks which shall be honored for passage on its cars, at the rate of eight and three-quarter cents each, which said tickets or fare checks shall be sold on the cars in quantities of four (or more, in the option of the company), and should the conductor of a car at any time be unable for any reason to sell a passenger desiring to purchase them at least four tickets or fare checks, then such passenger shall be required to pay but eight cents fare.

And it is further ordered: That in addition to the monthly reports required by the aforesaid Order No. 12639 of the Commission to be filed by the said The United Railways and Electric Company of Baltimore, the said Company shall furnish to this Commission annually accurate and complete statements under oath, showing in such detail as may be required by the Commission the actual accruals to and charges against the depreciation reserve as fixed upon the basis provided by the aforesaid opinion filed herewith, as well as the investment or other disposition of the funds represented by the balance in the said reserve, which statements shall be filed so soon as may be reasonably practicable and convenient after the end of each calendar year.

And it is further ordered: That except as hereinbefore modified, Order No. 12639 entered herein by the the Commission on February 10th, 1928, shall be and remain in full force and effect.

And it is further ordered: That this Order shall be effective from and after midnight of November 30th, 1928, and until the further order of the Commission.

And it is further ordered: That a copy of this order and a copy of the opinion hereinbefore referred to and filed herewith be forthwith served upon the said The United Railways and Electric Company of Baltimore, and that the said Company, within ten days from the date of the service of such copy, advise this Commission in writing whether or not it will accept and abide by the same.

HAROLD E. WEST,
J. FRANK HARPER,
STEUART PURCELL,
Commissioners.

State of Maryland, Office of the Public Service Commission, ss:

The preceding copy has been compared with the original Supplemental Opinion and Order No. 13420—In the matter of the application of The United Railways and Electric Company of Baltimore for the establishment of a permanent rate of fare, etc.,—Case No. 2648, on file in this office and I do Hereby Certify the same to be a correct transcript therefrom and of the whole thereof.

Witness, my hand and the Seal of Office of the Public Service Commission, at the City of Baltimore, this 11th day of January, one thousand nine hundred and twenty-nine.

(Seal.)

FRANK HARPER,
Secretary.

(5)

ANSWER TO SUPPLEMENTAL BILL OF COMPLAINT.

(Filed 29th December, 1928.)

ANSWER OF THE PUBLIC SERVICE COMMISSION OF MARYLAND.

To the Honorable, the Judge of said Court:

The answer of Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland (hereinafter referred to as the Commission), to the Supplemental Bill of Complaint of the United Railways and Electric Company of Baltimore (hereinafter referred to as the Company), filed against said Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, respectfully shows:

(1) The allegations of paragraph 1 of the Supplemental Bill are admitted.

(2) The allegations of paragraph 2 of the Supplemental Bill are admitted.

(3) The allegations of paragraph 3 of the Supplemental Bill are admitted.

(4) The allegations of paragraph 4 of the Supplemental Bill are admitted.

(5) The allegations of paragraph 5 of the Supplemental Bill are admitted.

(6) The allegations of paragraph 6 of the Supplemental Bill are admitted.

(7) Answering the 7th paragraph of said Supplemental Bill, the Commission says: That pursuant to the opinion of the Court of Appeals, rendered in these proceedings, the Commission, on November 19th, 1928, entered upon a rehearing of the proceedings theretofore held in this case in so far as they concerned the annual allowance for depreciation made in Order No. 12639 and the accompanying Opinion filed February 10th, 1928.

That prior to such proceedings, the Engineering and Accounting Departments of the Commission had made an intensive and thorough investigation and study of the property and records of the Company, with a view to determining the proper amount which should be allowed annually for depreciation of the Company's property, in accordance with the opinion of the Court of Appeals of Maryland in this case. That the proceedings held by the Commission with reference to the matter of depreciation were thorough, consisting of the hearing and consideration of testimony and exhibits offered by the Chief Engineer and Chief Auditor of the Commission, the Company offering no further evidence with respect to the matter in addition to that theretofore submitted. That on November 28th, 1928, the Commission filed an opinion and passed Order No. 13420 (of which the opinion was made part), by which opinion it found that $1,638,660, (instead of $883,544 previously allowed) is the proper annual amount to be allowed for depreciation, to conform with the opinion of the Court of Appeals of Maryland, and increased the Company's rate of fare to ten cents cash, or four tokens for thirty-five cents, other fares to remain as established by Order No. 12639. That the increase in fare so allowed by the Commission was intended to furnish only sufficient revenues to supply the increase made in the annual depreciation allowance of the Company.

(8) It is admitted that the Commission found (1) that the present fair value of the Company's property used in the public service is $75,000,000; (2) that the annual return which the Commission estimated would be yielded by the rates fixed in Order No. 12639 was $4,691,606; and that the same would amount to a return of 6.26 per cent. on the fair value of the Company's property. The remaining allegations of the 8th paragraph of the Supplemental Bill are denied.

(9) Answering the allegations of the 9th paragraph of the Supplemental Bill, the Commission denies the same, and further answering the allegations of said paragraph, the Commission specifically avers:

(a) That the maximum rates of fare which, by the Orders herein referred to, the Company is permitted to

charge and collect, are adequate to provide for the necessary expenses of its public service and for the consumption of its property employed in such service, and are adequate to yield a fair return upon the fair value of its property so employed, and are all that the services now rendered by the Company to the public is reasonably worth.

(b) That the percentage which the Commission estimated would be the rate of return on the fair value of the Company's property, yielded by the fares established by said Order, as so amended, was adopted by the Commission upon considerations bearing a true relation to the fairness of a return under the facts and circumstances, and is an adequate rate of return to compensate the Company for the use of its property in the public service.

(c) That the Commission lawfully and properly required the Company to abolish the second fare upon its Halethorpe Line.

And further answering the allegations of the said paragraph, the Commission avers that the decline in the number of passengers carried by the Company, and in the revenue received by it, under the fares fixed by the said Order as so amended, has been so marked as to indicate that the rates of fare therein fixed by the Commission have reached the full value of the service rendered by the Company to the public. That the average monthly rate of decline in the number of revenue passengers carried by the Company during the year 1927, when its application was pending before the Commission, below that carried in 1926, was less than 3 per cent. That under the fares fixed by the Commission in Order No. 12,639, the average monthly rate of decline in revenue passengers carried has been 9 per cent. during 1928 below those carried in 1927, or 12 per cent. below those carried in 1926, the accelerated decline being coincident with the increase in fare. The attendant increase in revenue was only .80 per cent. That, by reason of such decline in patronage, the Company's passenger revenue was increased less than one hundred thousand dollars ($100,000), during the first nine full months of operation under the fare of nine cents cash, with three tokens for twenty-five cents,

which was five-sixths of a cent higher than that obtaining when the Company filed its application in this case. That the rate of decline in revenue passengers has been even more marked under the higher fares fixed by Order No. 13,420, pursuant to the opinion and decree of the Court of Appeals, than under those fixed by Order No. 12,639. That the rates of fare fixed by the said Order No. 13,420 are among the highest charged in the United States for urban street railway transportation; and that the adverse effect of the said rates, and of those fixed by Order No. 12,639, upon the number of passengers and amount of revenue of the Company, has been so marked as to indicate that the said rates are at least equal to the present value of the service rendered by the Company to the public.

(10) The Commission denies the allegations of the 10th paragraph of the Supplemental Bill.

(11) The Commission denies the allegations of the 11th paragraph of the Supplemental Bill.

Wherefore, having fully answered said Supplemental Bill of Complaint, these respondents pray that the Supplemental Bill may be dismissed with costs.

(Signed) THOMAS J. TINGLEY,

(Signed) RAYMOND S. WILLIAMS,

Special Counsel to the Public Service Commission of Maryland.

(Signed) HAROLD E. WEST,

Chairman of the Public Service Commission of Maryland.

State of Maryland, City of Baltimore, to wit:

I hereby certify that on this 29th day of December, 1928, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared Harold E. West, Chairman of the Public Service Commission of Maryland, and made oath in due form of law that the matters and facts set

forth in the foregoing Answer are true, to the best of his knowledge, information and belief.

Witness my hand and Notarial Seal.

(Signed) EVELYN M. WYNIGER,
Notary Public.

My Commission expires May 2, 1929.

TRANSCRIPT OF PAPERS AND PROCEEDINGS BEFORE THE PUBLIC SERVICE COMMISSION FILED IN THIS COURT ON JANUARY 10, 1929, AND WITH THE COMMISSION ON SEPTEMBER 1, 1928, AND SEPTEMBER 6, 1928.

(Filed 10th January, 1929.)

Before The Public Service Commission of Maryland.

Case No. 2648.

In the Matter of the Application of The United Railways and Electric Company of Baltimore for the Establishment of a Permanent Rate of Fare of Ten Cents and for the Establishment of a Temporary Emergency Rate of Fare Pending the Establishment of Such Permanent Rate of Fare.

To the Honorable, The Public Service Commission of Maryland:

The United Railways and Electric Company of Baltimore, the petitioner in the above entitled case, respectfully shows unto your Honorable Commission:

1. By the decree of the Circuit Court No. 2 of Baltimore City entered pursuant to the mandate of the Court

of Appeals on August 31, 1928, in the cause in said Court entitled The United Railways and Electric Company of Baltimore vs. Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, it was adjudged, ordered and decreed that, the schedule of fares fixed by Order No. 12639 of this Commission herein being in part based upon an allowance for annual depreciation arrived at by unlawful and unreasonable methods and by the use of an unlawful and unreasonable basis, viz., the basis of cost of your petitioner's depreciable property instead of the proper basis, its present value, the proceedings herein before this Commission involved in said cause were remanded to the Commission with directions to further consider the question of depreciation, determine the proper allowance for depreciation in accordance with the opinion of the Court of Appeals and make any changes in said rate schedule which may be necessary and requisite to yield to your petitioner a fair and reasonable return (in accordance with said opinion) upon the fair value of its property.

2. The Court of Appeals has determined and adjudged that it was confiscatory and contrary to the provisions of the Constitution of the United States (as well as unlawful, unreasonable, artificial, illogical and unsound) for this Company to base the annual allowance to your petitioner for depreciation on cost, as the Commission did by said Order No. 12639 herein, instead of upon the present value, of its depreciable property. Your petitioner therefore is and long has been suffering daily confiscation of its property, which confiscation has already continued more than a year since your petitioner's application for relief herein.

Wherefore your petitioner prays that this Honorable Commission forthwith perform said decree of the Circuit Court No. 2 of Baltimore City by further considering the question of depreciation, determining the proper allowance for depreciation in accordance with the opinion of the Court of Appeals and making such changes in said rate schedule as may be necessary and requisite, by reason of said determination of the proper allowance for de-

preciation, to yield to your petitioner a fair and reasonable return (in accordance with said opinion) upon the fair value of its property, and that your petitioner be given notice of and opportunity to appear at the taking of additional testimony, if any, in so performing said decree.

Respectfully submitted,

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,

By C. D. EMMONS, (Signed)
President.

(Signed)
J. C. FRANCE,
VENABLE, BAETJER & HOWARD,
HAMAN, COOK, CHESNUT & MARKELL,
HENRY H. WATERS,
Attorneys for Petitioner.

State of Maryland, City of Baltimore, ss:

I hereby certify that on this 1st day of September, 1928, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared Charles D. Emmons, President of The United Railways and Electric Company of Baltimore, and made oath in due form of law that the matters and facts set forth in the aforegoing petition are true as stated to the best of his knowledge, information and belief.

As Witness my hand and notarial seal.

(Signed) W. FRANK REED,
Notary Public.

(Seal.)

ORDER NO 13168.

Before The Public Service Commission of Maryland.

Case No. 2648.

In the Matter of the Application of The United Railways and Electric Company of Baltimore for the Establishment of a Permanent Rate of Fare of Ten Cents and for the Establishment of a Temporary Emergency Rate of Fare Pending the Establishment of Such Permanent Rate of Fare.

The Circuit Court No. 2 of Baltimore City, by its order entered on August 31st, 1928, in the case of The United Railways and Electric Company of Baltimore vs. Harold E. West et al., having remanded this case to the Public Service Commission of Maryland with directions to further consider the question of depreciation, determine the proper allowance for depreciation in accordance with the opinion of the Court of Appeals and make any changes in the rate schedule which may be necessary and requisite, it is, this 6th day of September, 1928, by the Public Service Commission of Maryland,

Ordered, That the same be, and it is hereby, set for further hearing at the office of the Commission, Baltimore, Maryland, on Thursday, November 15th, 1928, at 10:00 o'clock A. M.

(7)

DECREE.

(Filed 10th January, 1929.)

This cause having been set down for hearing and coming on to be heard on the pleadings and the transcript of papers and proceedings, including evidence, in the case before the Public Service Commission and counsel for

the parties having been heard and the Court being of the opinion, in accordance with the views expressed in the opinion of the Court of Appeals and pursuant to the mandate of the Court of Appeals, that the rates fixed by Order No. 12,639 of the Public Service Commission passed on February 10th, 1928, as amended by Order No. 13,420 passed on November 28, 1928, and said orders are not unconstitutional, unlawful or unreasonable, and do not fail to allow to the plaintiff a fair return on the fair value of its property.

It is thereupon this 10th day of January, nineteen hundred and twenty-nine, by the Circuit Court No. 2 of Baltimore City, Adjudged, Ordered and Decreed that an injunction, as prayed in the supplemental bill of complaint or otherwise, be and it hereby is refused, that vacation and setting aside of Order No. 12,639 of the Public Service Commission of Maryland, as amended by Order No. 13,420, and/or prior orders of said Commission in so far as said order and/or orders fix or limit the schedule of fares to be charged by the plaintiff, as prayed in the supplemental bill of complaint or otherwise, be and the same hereby is refused and that the supplemental bill of the plaintiff be and it hereby is dismissed with costs.

JOSEPH N. ULMAN.

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(8)

Mr. Clerk:

Please enter an appeal by the plaintiff to the Court of Appeals from the decree entered in the above entitled case on the 10th day of January, 1929.

JOS. C. FRANCE,

HENRY H. WATERS,

HAMAN, COOK, CHESNUT & MARKELL,

VENABLE, BAETJER & HOWARD,

Solicitors for The United Railways and Electric Company of Baltimore, Plaintiff.

(9)

STIPULATION.

(Filed 26th January, 1929.)

Mr. Clerk:

In making up the transcript of the record on appeal please proceed as follows:

Include:

1. Docket Entries subsequent to First Appeal.

2. Decree entered August 31st, 1928, pursuant to Decree of the Court of Appeals.

3. Supplemental Bill of Complaint.

4. Plaintiff's Exhibit B filed with the Supplemental Bill of Complaint.

5. Answer to Supplemental Bill of Complaint.

6. Final Decree.

7. Order for Appeal.

8. In the transcript of papers and proceedings, including evidence, in the case before the Public Service Commission, (a) the Petition of The United Railways and Electric Company of Baltimore filed September 1st, 1928, and (b) the Order of the Commission dated September 6th, 1928.

9. This request as to making up the transcript of the record.

Omit:

1. All proceedings in this Court prior to the First Appeal.

2. In the transcript of papers and proceedings, including evidence, in the case before the Public Service Commission,

(a) All papers proceedings, including evidence, on or prior to February 10th, 1928, said papers and proceedings being sufficiently included in the record in this cause in the Court of Appeals on the first appeal.

(b) All formal matters such as order postponing hearing from November 15th to November 19th, admissions of service and other letters and replies not offered in evidence.

(c) All evidence subsequent to February 10th, 1928, it being hereby admitted that the only additional evidence offered before the Commission subsequently to February 10th, 1928, was the testimony and exhibits offered by the Chief Engineer and Chief Auditor of the Commission concerning the annual allowance for depreciation, viz., the testimony and exhibits referred to in the Commission's opinion filed November 28th, 1928, in paragraph 7 of the supplemental bill and in paragraph (7) of the answer to the supplemental bill, and that in this cause, whether in this Court or any higher Court of Appeal, the plaintiff does not and can not dispute the Commission's position that said omitted evidence includes substantial evidence tending to support all the statements in paragraph (7) of the answer to the supplemental bill and all the statements in the nature of findings of fact on the subject of depreciation allowance in the Commission's opinion filed November 28th, 1928, and to this extent tending to rebut the plaintiff's evidence in support of a larger depreciation allowance in the record on the former appeal.

(d) The Commission's opinion and order filed as Exhibit B with Supplemental Bill.

JOSEPH C. FRANCE,

HENRY H. WATERS,

HAMAN, COOK, CHESNUT & MARKELL,

VENABLE, BAETJER & HOWARD,

Solicitors for The United Railways and Electric Company of Baltimore, Plaintiff and Appellant.

RAYMOND S. WILLIAMS,

THOMAS J. TINGLEY,

Solicitors for The Public Service Commission, Defendants and Appellees.

Which said appeal being by the Court here also granted, it is thereupon ordered by the Court here that transcript of the record of proceedings in the case aforesaid be transmitted to the Court of Appeals of the State of Maryland under the rules thereof, and the same is transmitted accordingly.

Test: JOHN PLEASANTS,
Clerk of the Circuit Court No. 2
of Baltimore City.

In Testimony Whereof, that the aforegoing is a full and true transcript of the aforegoing papers taken from the Record of Proceedings in the Circuit Court No. 2 of Baltimore City in the cause therein mentioned.

I hereto set my hand and affix the seal of the said Circuit Court No. 2 of Baltimore City on the 29th day of January, in the year of our Lord, nineteen hundred and twenty-nine.

(Seal.)

Test: JOHN PLEASANTS,
Clerk of the Circuit Court No. 2
of Baltimore City.

IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1929

No. 71

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

vs.

HAROLD E. WEST et al., Constituting the Public Service Commission of Maryland

Appeal from the Circuit Court No. 2 of Baltimore City. Filed January 29, 1929. Advanced from April Term, 1929; was No. 7 of that Term

DOCKET ENTRIES

March 20th, 1929, Decree affirmed with costs.
Opinion filed. Op., Offutt, J., to be reported.
Parke, J., dissents.
Bond, C. J.: While still holding the views expressed in the dissenting opinions filed on the former appeal in this litigation, I take the questions to be closed in this Court by the previous decision.

Bill of costs omitted in printing.

STATE OF MARYLAND, sct:

I, James A. Young, Clerk of the Court of Appeals of Maryland, do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this twenty-third day of March, A. D. 1929.

James A. Young, Clerk of the Court of Appeals of Maryland. (Seal Court of Appeals, Maryland.)

IN COURT OF APPEALS OF MARYLAND, JANUARY TERM, 1929

No. 71

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

vs.

HAROLD E. WEST et al., Constituting the Public Service Commission of Maryland

Judge OFFUTT delivered the Opinion of the Court.
Judge PARKE dissents.

OPINION—Filed March 20, 1929

The most important question presented by this appeal is whether the Public Service Commission of Maryland in limiting the United Railways and Electric Company of Baltimore to a rate schedule which permits it to earn reasonably efficient management a return of 6.26% on the total value of its property deprives it of its property without due process of law.

While that question was considered and decided adversely to appellant's contention in West vs. United Railways and Electric Company 155 Md. 572, 142 Atl. 870, the decree in that case was reversed and the case remanded that the allowance made by the Commission for the annual depreciation of the Company's property might be reconsidered and dedetermined in accordance with the views expressed in the opinion.

Subsequent to the remand proceedings were had which resulted in increasing the allowance for depreciation by $755,116, and following that increase the Commission revised the schedule of rates fixed in its order involved in the former appeal, and permitted appellant to charge a base rate of 8¾ cents when tokens were sold, or ten cents cash, for the transportation of passengers over twelve years of age, as compared with 8⅓ cents when tokens were sold or 9 cents cash, allowed by its previous order.

Thereupon the appellant filed a supplemental bill in which omitting so much as is merely argumentative or historical

it alleges: "As the Commission thus found, all the evidence before the Commission showed, and the fact is, said increase in rate permitted by Order No. 13430 is not more than is required to increase the Company's annual return by $755,116, viz, the amount of the increase in annual allowance for depreciation, and the increased rates permitted by Order No. 12639, as so amended by Order No. 13420, will yield the Company an annual return not more in any event than $4,691,606, the amount which the Commission in its opinion filed February 10, 1928, found could reasonably be expected from the rates fixed by Order No. 12639. * * * The annual return that can be expected by the Company from said rates (as increased by Order No. 13420) is not more than $4,691,606, and not more than 6.26 per cent. on the fair value of the Company's property, and an annual return of $4,691,606 or of 6.26 per cent, would be substantially less than a fair return such as the Company is entitled under the Constitution of the United States, and also under the Maryland Bill of Rights and the Public Service Commission Law, to be permitted to earn. Said Order No. 12639, as so amended by Order No. 13420, of the Commission, therefore, and any prior orders of the Commission limiting the Company to the same or lower rates, are contrary to the Fourteenth Amendment of the Constitution of the United States and to the Maryland Bill of Rights and the Public Service Commission Law and are null and void, and, so long as they are enforced, deprive the Company of its property without due process of law, and said orders and the rates, regulations, practices, acts and services fixed thereby are unlawful and unreasonable.

In each and all of the following respects Order No. 12639, (as amended by Order No. 13420), of the Commission, and the Commission's opinion made a part of Order No. 12639, (as modified by the opinion made a part of Order No. 13420), and any prior orders of the Commission limiting the Company to the same or lower rates, and the rates, regulations, practices, acts and services fixed by said orders, or any of them, are unlawful, unreasonable, arbitrary, unsupported by any substantial evidence, contrary to the facts established by substantial evidence, confiscatory and contrary to the Fourteenth Amendment of the Constitution of the United States and to the Maryland Bill of Rights and the

Public Service Commission Law and null and void. * * *

The Commission by said order burdened the Company with a substantial loss of revenue by requiring it to abolish the second fare upon its Halethorpe line, which loss, without any compensating offset, and without any lawful reason for abolition of said fare, further diminishes the inadequate return upon the Company's property. * * *

That the action of the Commission in so refusing to allow the Company to charge and collect for its service the rates of fare proposed and required by it, limiting it to the rates specified and provided in said opinion and said order of February 10, 1928, as modified and amended by said opinion and said order of November 28, 1929, and abolishing its second fare on its Halethorpe line is therefore not only unreasonable but confiscatory, unlawful and void, and constitutes a taking of the Company's property without adequate compensation and without due process of law."

Upon those allegations it prayed:

"That the aforesaid Order No. 12639, passed February 10, 1928, as amended by the aforesaid Order No. 13420, passed November 28, 1928, of the Public Service Commission of Maryland, the defendants herein, in so far as it purports to limit the rates of the United Railways and Electric Company of Baltimore, the plaintiff herein, so as to prevent the plaintiff from charging a flat fare of ten cents or from making similar increases in com-utation and other special rates or from continuing the first and second fare zones on the Halethorpe line as they existed on February 10, 1928, and any prior orders of the Commission in so far as they purport so to limit the rates of the Company, and the rates, regulations, practices, acts and services fixed by said orders or any of them in so far as they purport to limit the Company as aforesaid, be adjudged and decreed to be unlawful, unreasonable, unconstitutional, null and void and be vacated and set aside.

That the defendants, Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, members, constituting the Public Service Commission of Maryland, and their respective successors in office, agents and attorneys, and all persons acting under their authority may be perpetually and also preliminarily pending this suit, restrained and

enjoined from enforcing or continuing in force against the pla-ntiff the aforesaid Order No. 12639 (as amended by the aforesaid Order No. 13420) in so far as it purports to limit the rates of the plaintiff so as to prevent the plaintiff from charging a flat rate of ten cents or from making similar increases in commutation and other special rates or from continuing the first and second fare zones on the Halethorpe line as they existed on February 10, 1928, or any prior orders of the Commission in so far as they purport so to limit the rates of the Company."

The appellee answered the bill stating that "on November 28, 1928, the Commission filed an opinion and passed Order No. 13420 (of which the opinion was made part), by which opinion it found that $1,638,660, (instead of $883,544 previously allowed) is the proper annual amount to be allowed for depreciation, to conform with the opinion of the Court of Appeals of Maryland, and increased the Company's rate of fare to ten cents cash, or four tokens for thirty five cents, other fares to remain as established by Order No. 12639. That the increase in fares so allowed by the Commission was intended to furnish only sufficient revenues to supply the increase made in the annual depreciation allowance of the Company, "admitting that" (1) that the present fair value of the Company's property used in the public service is $75,000,000; (2) that the annual return which the Commission estimated would be yielded by the rates fixed in Order No. 12639 was $4,961,606; and that the same would amount to a return of 6.26 per cent. on the fair value of the Company's property," and denying the allegations of the ninth and tenth paragraphs from which we have quoted.

The case was heard upon those pleadings, and a transcript of the proceedings before the Commission and at the conclusion of the hearing the court refused the injunction prayed and dismissed the Bill. The appeal from that decree submits three questions (1) whether a schedule of rates which permits the appellant to earn 6.26% on the fair value of its property is confiscatory, (2) whether any schedule of rates less than that proposed by it, to wit, a flat rate of ten cents and "similar increases" in commutation and other special rates, is confiscatory, and (3) whether so much of the order of the Commission as consolidates the first and

second fare zones on the Halethorpe line as they existed on February 10th, 1928, is unlawful.

These several questions were, as we have stated, submitted to this court at an earlier stage of this proceeding, West vs. Public Service Commission, supra, and as nothing which has transpired since has any direct connection with them, it is unnecessary to repeat or to restate the reasons which led us in that case to decide upon the evidence now as then, before us: (1) that a rate schedule which permitted the Company to earn by reasonably efficient management 6.26% on the fair value of its property was not confiscatory, (2) that any schedule of rates less than that proposed by the Company, to wit, a flat fare of ten cents and "similar increases" in commutation and other special rates was not necessarily confiscatory, and (3) that the consolidation of the first and second zones in the Halethorpe line was unlawful. But it is sufficient to say, that for the reasons given in the opinion filed in that case, we find no error in the decree from which this appeal was taken, and it will therefore be affirmed.

Decree affirmed with costs.

BOND, C. J.:

While still holding the views expressed in the dissenting opinions filed on the former appeal in this litigation, I take the questions to be closed in this court by the previous decision.

IN COURT OF APPEALS OF MARYLAND, JANUARY TERM, 1929

No. 71

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

vs.

HAROLD E. WEST et al., Constituting the Public Service Commission of Maryland

DECREE—Filed March 20, 1929

The appeal in this case standing ready for hearing, was submitted on brief by Counsel for the respective parties,

and the proceedings have since been considered by the Court.

It is thereupon this 20th day of March, 1929, by the Court of Appeals of Maryland, and by the authority thereof, adjudged, ordered and decreed that the decree dated January 10th, 1929, of the Circuit Court No. 2 of Baltimore City, be and the same is hereby affirmed with costs.

Carroll T. Bond, Jno. R. Pattison, Hammond Urner, Wm. H. Adkins, T. Scott Offutt.

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed March 23, 1929

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland:

The petition of The United Railways and Electric Company of Baltimore, a body corporate, appellant in the Court of Appeals of Maryland, plaintiff in the Circuit Court No. 2 of Baltimore City and hereinafter called "plaintiff," respectfully shows:

1. That as fully appears from the record in this cause, this cause is and was in the Circuit Court No. 2 of Baltimore City and in the Court of Appeals of Maryland a suit where was drawn in question the validity of certain statutes of the State of Maryland, viz., statutes relating to the Public Service Commission of Maryland and certain orders of the Public Service Commission of Maryland purporting to have been made pursuant to said statutes, on the ground of said statutes (including said orders) being repugnant to the Constitution of the United States, and the final decree of the Court of Appeals of Maryland made and entered in said cause on March 20, 1929, was and is a decision in favor of the validity of said statutes (including said orders).

2. Your petitioner, for the reasons specified in the assignment of errors which is filed herewith, conceives itself

aggrieved by said final decree made and entered by the Court of Appeals of Maryland on March 20, 1929.

Wherefore your petitioner prays that an appeal may be allowed herein from the Court of Appeals of Maryland to the Supreme Court of the United States and that an order may be passed fixing the amount of the bond on said appeal.

Henry H. Waters, J. C. France, Charles McA. Howard, Chas. Markell, Counsel for the United Railways and Electric Company of Baltimore, Appellant.

And now, to wit, on March 23d, 1929, it is ordered that an appeal from the Court of Appeals of Maryland to the Supreme Court of the United States be allowed as prayed, upon the filing of a bond in the sum of five hundred dollars ($500) with good and sufficient security and Fidelity and Deposit Company of Maryland is accepted as surety on said bond and said bond is now approved.

Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland.

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 23, 1929

Now comes The United Railways and Electric Company of Baltimore, a body corporate, appellant in the Court of Appeals of Maryland, plaintiff in the Circuit Court No. 2 of Baltimore City and hereinafter called "plaintiff," and for its assignment of errors shows:

1. That the Court of Appeals of Maryland erred in not reversing the decree of the Circuit Court No. 2 of Baltimore City dismissing the plaintiff's supplemental bill of complaint and in not adjudging and decreeing that the rates fixed by Order No. 12,639 of the Public Service Commission of Maryland, passed on February 10, 1928, as

amended by Order No. 13,420 passed on November 28, 1928, and said orders and prior orders limiting rates charged by the plaintiff are unconstitutional and fail to allow to the plaintiff a fair return on the fair value of its property, (i. e., that they deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States) and in not vacating and setting aside Order No. 12,639, as amended by Order No. 13,420, in so far as the same purports to limit the rates of the plaintiff and in not enjoining the defendants (appellees in the Court of Appeals of Maryland, defendants in the Circuit Court No. 2 of Baltimore City and herein called "defendants") against enforcing against the plaintiff the provisions of said Order No. 12,639, as amended by Order No. 13,420, or any prior orders, in so far as the same limit or purport to limit the rates of fare to be charged by the plaintiff.

2. That the Court of Appeals of Maryland erred in not holding that a schedule of fares which permits the plaintiff to earn a return of not more than 6.26 per cent on the fair value of its property is confiscatory and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in holding that Order No. 12,639 of the Public Service Commission of Maryland, as amended by Order No. 13,420, and the schedule of rates fixed thereby, are not confiscatory and do not deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

3. That the Court of Appeals of Maryland erred in holding that the question whether fares which permit a return of only 6.26 per cent are confiscatory "must be approached * * * from the standpoint of the State" and in such approach "factors * * * such as the nature and necessity of the service, the effect of its continuance or withdrawal, both upon the security holders of the corporation, and upon property values, and the welfare of the people in the territory served by it, the extent to which the State itself is a partner in the enterprise, and the circumstances and condi-

tions under which the [plaintiff] acquired and exercises its franchises and privileges may become of paramount and controlling importance"; thus holding that, under the guise of "approaching" the question what is a fair return and giving weight to various "factors" in the question, the question may actually be ignored and evaded and supplanted by various so-called "factors" which do not properly control or affect the question at all.

4. That the Court of Appeals of Maryland erred in holding that the plaintiff's constitutional right to a fair return on the fair value of its property affords no excuse for "increasing [its rates] to a point which will not only be burdensome to the traveling public but will at the same time yield to the [plaintiff] a greater return than it has ever received, and greater than that actually received by others operating in the same field elsewhere under substantially the same conditions" [i. e., under confiscatory rates], and that "whether a given rate is burdensome to the public involves an extremely difficult and troublesome question, the answer to which, except in extreme cases, can only rest in the judgment of the Commission operating upon varying factors each of which is entitled to some weight, but no one of which ordinarily is controlling," thus holding that private property embarked in a utility business does not "rest secure under the constitutional protection which extends * * * to the right to receive just compensation for the service given to the public" [The Minnesota Rate Cases, 230 U. S. 352, 434] but that this constitutional protection "can rest only in the judgment of the Commission" and that past confiscation of the plaintiff's property and present confiscation elsewhere legalize perpetual confiscation of the plaintiff's property.

5. That the Court of Appeals of Maryland erred in holding that "in determining whether the rates fixed by the Commission are confiscatory we are finally remitted to a few simple realities, such as the past earnings of the Company, [to which the Court of Appeals gives effect precisely the opposite of that given by the Supreme Court of the United States], the returns usually received by other companies engaged in the same business under somewhat similar conditions [i. e., under confiscatory rates], the rates

which the [plaintiff] has voluntarily fixed for its service in the past, the decrease in the purchasing power of the dollar, and the effect which other orders of the Commission have had upon the earning power of the [plaintiff]", but that the last two of these factors (regarded by the Court of Appeals as tending to support the plaintiff's position) "were considered fully by the Commission when it fixed the base fare at 7½ cents in 1924, and in view of that finding and of the further fact that the record does not disclose any data sufficiently specific to enable us to say that it was unlawful, we are not inclined to give them any controlling weight now"; thus holding (1) that the question whether rates are confiscatory may be determined from "simple realities" which do not properly affect the question at all and (2) that on this question of confiscation a previous rate order is (unless now specifically proved to have been unlawful) res judicata as to facts then considered by the Commission, although (a) commission rate orders do not so operate and (b) this 1924 rate order could not so operate because the value of the plaintiff's property had not been determined at all and in that case the question of confiscation could not be and was not determined by the Commission and the Commission's own views were expressly tentative, pending determination of the value of the plaintiff's property.

6. That the Court of Appeals of Maryland erred in not holding that failure of a State to "provide a fair opportunity for submitting" the question of confiscation "to a judicial tribunal for determination upon its own independent judgment as to both law and facts" is a deprivation of liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in holding that the Supreme Court of the United States (in so holding) did not mean what it said but meant precisely the opposite.

7. That the Court of Appeals of Maryland erred in confusing the opinion of the Supreme Court in McCardle vs. Indianapolis Water Works Co., 272 U. S. 419, with the dissenting opinion, treating the dissenting opinion as an "interpretation" instead of a negation of the Court's opinion, and thus acting on that case as not deciding what it very clearly did decide, viz., that on the evidence therein and the

authority of recent decisions in other cases, rates yielding a return of less than 7 per cent. would be confiscatory.

8. That the Court of Appeals of Maryland erred in holding that decisions of the Supreme Court of the United States that certain utilities are entitled to certain returns on the value of their properties "are uniformly found to be based upon facts peculiar to the several cases" and in the instant case the Court of Appeals "is little aided by what" the Supreme Court "may upon different facts have found to be lawful or confiscatory, fair or unreasonable rates."

9. That the Court of Appeals of Maryland erred (when holding that Maryland statutes deprive all Maryland courts of the right and power to enjoin enforcement of confiscatory rate orders, thereby deprive the plaintiff of all judicial remedy against the enforcement of confiscatory rate orders, and in lieu of all judicial remedy merely remand the plaintiff for relief against confiscation to the confiscators themselves) in not holding that Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

10. That the Court of Appeals of Maryland erred (when holding that by reason of Maryland statutes, one confiscatory rate order might be vacated by the Courts, leaving prior orders still more confiscatory in force, but all unconstitutional orders can not be vacated by the Courts, thus holding that the Courts can protect constitutional rights against one unconstitutional order but, when all orders are unconstitutional, can only remand the plaintiff to further action by the confiscators) in not holding that the Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

11. That the Court of Appeals of Maryland erred (when holding that Maryland statutes not only empower the Public Service Commission to regulate the plaintiff's rates but also deprive the plaintiff of its constitutional right, subject to regulation, to initiate and make rates) in not holding that Maryland statutes, so construed and applied, de-

prive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

12. That the Court of Appeals of Maryalnd erred (when holding that even the fact that all Commission rates are confiscatory does not "authorize * * * the [plaintiff] to fix" its own rates (subject to the continuing power of regulation) or the Courts to set aside all unconstitutional Commission orders and "leave the question of rates * * * to the discretion of the [plaintiff]" (subject to regulation), but "under the statute the power to [fix rates] is in the Commission alone") in not holding that the Maryland statute, so construed and applied, makes the Commission "the financial manager" of the plaintiff and clothes the Commission "with the general power of management incident to ownership" [Southwestern Tel. Co. v. Public Service Commission, 262 U. S. 276, 289] and thereby deprives the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

13. That the Court of Appeals of Maryland erred in not reversing the decree of the Circuit Court No. 2 of Baltimore City dismissing the plaintiff's supplemental bill of complaint, and in not adjudging and decreeing that that portion of Order No. 12,639 of the Public Service Commission of Maryland which extended the first fare zone on the plaintiff's Halethorpe line to the terminus of said line at Halethorpe is unconstitutional and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in not vacating and setting aside said portion of said order and enjoining the defendants against enforcing the provisions of said order.

Wherefore the plaintiff prays that the said decree of the Court of Appeals of Maryland made and entered on March 20, 1929, be reversed and that said Court may be directed to enter a decree in favor of the plaintiff.

Chas. Markell, Henry H. Waters, J. C. France, Charles McA. Howard, Counsel for the United Railways and Electric Company of Baltimore, Appellant.

Bond on Appeal for $500.00, approved and filed March 23, 1929, omitted in printing.

Citation, in usual form, showing service on Thomas J. Tingley and Raymond S. Williams, filed March 23, 1929, omitted in printing.

IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION TO PRINT ENTIRE RECORD—Filed March 27, 1929

Comes now The United Railways and Electric Company of Baltimore, the appellant in the above entitled cause, and adopts its assignments of error as the points upon which it intends to rely in this Court in said cause.

Henry H. Waters, Chas. Markell, Charles McA. Howard, Counsel for The United Railways and Electric Company of Baltimore, Appellant.

Service of copy of above designation of points to be relied on admitted this 23d day of March, 1929.

Thomas J. Tingley, Raymond S. Williams, Counsel for Public Service Commission of Maryland, Appellees.

STIPULATION

In lieu of designation and counter-designation by the respective parties to the above appeal of the parts of the record to be printed, it is hereby stipulated and agreed as follows:

Both parties to the above appeal state that in their opinion the whole of the record as filed is necessary for the consideration of the case, that said record has been printed and used upon the hearing in the Court below, viz., the Court of Appeals of Maryland, that twenty-five (25) copies of said record as printed for use in the Court of Appeals of Maryland have been transmitted to the Clerk of the Su-

preme Court of the United States (including the portion of said record so printed and transmitted on the former appeal to the Supreme Court of the United States, No. 464, October Term, 1928, dismissed for want of finality in the decree appealed from), and that said copies so printed may be used by the Clerk of the Supreme Court of the United States in the preparation and as a part of the printed record of the Supreme Court of the United States in the above entitled case.

Charles McA. Howard, Chas. Markell, Henry H. Waters, Counsel for The United Railways and Electric Company of Baltimore, Appellant. Thomas J. Tingley, Raymond S. Williams, Counsel for Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, Constituting the Public Service Commission of Maryland, Appellees.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,101. Maryland Court of Appeals. Term No. 792. The United Railways and Electric Company of Baltimore, appellant, vs. Harold E. West, Chairman, and J. Frank Harper et al., constituting the Public Service Commission of Maryland. Filed March 27th, 1929. File No. 34,101.

IN COURT OF APPEALS OF MARYLAND

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, Appellant,

vs.

HAROLD E. WEST, Chairman, and J. FRANK HARPER and Steuart Purcell, Members, Constituting the Public Service Commission of Maryland, Appellees

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed April 9, 1929

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland:

The petition of Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, Appellees in the Court of Appeals of Maryland, defendants in the Circuit Court No. 2 of Baltimore City, and hereinafter called the Commission, respectfully shows:

1. That, as fully appears from the record in this case, this case is and was in the Circuit Court No. 2 of Baltimore City and in the Court of Appeals of Maryland, a suit wherein was drawn in question by The United Railways and Electric Company of Baltimore, hereinafter called the Company, the validity of a certain order and/or orders of the Public Service Commission of Maryland, on the ground of the same being repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. The validity, in particular, of Order No. 12,639 of the Commission, passed February 10, 1928, was drawn in question on the ground that the said Order established rates to be charged by the Company for street railway transportation in the City of Baltimore, Maryland, and its vicinity, which resulted in a rate of return of 6.26 per cent. to the said Company, which rate of return, it was alleged, was confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States; and on the further ground, inter alia, that the Commission, in fixing

the said rates, calculated the annual depreciation allowance granted to the Company so as to restore the original cost of property consumed or retired in public service, rather than the present day value of such property, which action was also alleged by the Company to be confiscatory within the prohibition of the said Amendment. The rates in question, fixed by the said Order of the Commission, were a cash fare of nine cents, with three tokens for twenty-five cents.

3. The Court of Appeals of Maryland held that the rate of return estimated to result from the said rates of fare was not confiscatory, but further held that the action of the Commission in restoring through the annual depreciation allowance of the Company the cost of depreciable property consumed or retired in public service, rather than its present day value, as above, was confiscatory, and hence that the Company might not be actually receiving the return of 6.26 per cent. estimated by the Commission to be yielded by the rates as established above. The Court of Appeals accordingly remanded the case, with directions to the Commission to further consider the question of depreciation, investigate the property of the Company with a view to a determination of its condition and probable life, and if necessary, readjust the rate schedules of the Company so as to reflect any increased amount which might be found necessary, in order to restore to the Company the present day value, rather than the cost, of property consumed or retired in the public service.

4. This decree of the Court of Appeals of Maryland was passed on July 16, 1928. Thirty days thereafter the mandate of the Court of Appeals was directed to and received by the Circuit Court No. 2 of Baltimore City, which Court, on August 31st, 1928, entered an order remanding the case to the Commission for further proceedings as directed by the Court of Appeals.

5. The Commission, pursuant to the direction of the Court of Appeals, made an investigation of the condition of the property of the Company, held hearings thereon and as a result thereof, on the twenty-eighth day of November, 1928, passed its opinion and order, the latter being Order No. 13,420, in which it found that, on the basis of restoring through the annual depreciation allowance of the Company,

the present day value of property consumed or retired in service, the Company was entitled to an allowance of $1,638,660 for its annual depreciation allowance, the same being an increase of $755,116 over the allowance previously found, which was calculated to restore the cost of the Company's property and allowed an increase in the Company's rate of fare charged to the public to a cash fare of ten cents, with four tokens for thirty-five cents.

6. The Company, on August 25, 1928, secured an order from the Chief Judge of the Court of Appeals of Maryland allowing an appeal from the portions of the said decree of the said Court of Appeals, adverse to its contentions, including therein the contention that the rate of return estimated to be yielded by the rates fixed by the Commission was confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States; that the action of the Court, in not vacating, setting aside or enjoining the rates fixed by the Commission, instead of remanding the case, in view of its finding as to the proper basis for the annual depreciation allowance, was also confiscatory; and that the action of the Court in sustaining the Commission with respect to a provision of their order directing the extension of the single fare zone to the community of Halethorpe, situated beyond the City limits of Baltimore, was also confiscatory. This appeal was docketed as Case No. 464 in the October Term, 1928, of the Supreme Court of the United States.

7. The Commission, on September 19th, 1928, secured an order from the Chief Judge of the Court of Appeals of Maryland, allowing an appeal from the portion of the said decree of the Court of Appeals, holding that the action of the Commission in calculating the annual depreciation allowance of the Company so as to restore cost, and not present day value, of property of the Company consumed or retired in the public service, was confiscatory. This appeal was docketed as Case No. 465 in the October Term, 1928, of the Supreme Court of the United States. The Commission also filed in the said proceedings a petition for a writ of certiorari on the said grounds.

8. The Supreme Court, on November 19, 1928, dismissed both appeals and denied the petition for certiorari on the

ground that the decree sought to be reviewed was not a final one (73 L. ed. 180).

9. The Company thereupon filed a Supplemental Bill of Complaint in the Circuit Court No. 2 of Baltimore City, containing the same allegations set forth in the original Bill with respect to the alleged confiscatory character of the rate of return yielded by the rates fixed by the Commission and the alleged confiscatory character of the provisions in the Order of the Commission extending the single fare zone to Halethorpe. The Supplemental Bill of Complaint set forth the proceedings of the Commission with respect to the annual depreciation allowance held pursuant to the direction of the Court of Appeals on remand, and recited that the increase in fare to a fare of ten cents cash, with four tokens for thirty-five cents, fixed by the Commission as a result thereof in its Order No. 13,420, would not yield revenues in excess of the amount found necessary by the Commission to increase the annual depreciation allowance of the Company to the extent above set forth. The Circuit Court No. 2 of Baltimore City, on January 10, 1929, refused an injunction as prayed in the Supplemental Bill of Complaint, refused to vacate and set aside Order No. 12,639, as amended by Order No. 13,420, and/or prior orders of the Commission, insofar as they fixed or limited the schedule of fares to be charged by the Company, and dismissed the Supplemental Bill of Complaint with costs. This action was affirmed by the Court of Appeals of Maryland on appeal by the Company in an opinion and decree dated March 20th, 1929. From this action of the Court of Appeals, the Company has again appealed to the Supreme Court of the United States.

10. That the question of whether cost or value of property consumed or retired in service should be restored through the operation of the annual depreciation allowance fixed for the Company, is an integral and indispensable part of the present case, and of the decree entered by the Court of Appeals therein, and that the case cannot be properly or adequately considered without determining it, and that the decree of the Court of Appeals of Maryland, dated July 16, 1928, is single and inseverable, and that the decree of the Court of Appeals dated March 10, 1929, cannot

properly be reviewed without consideration of that question.

11. The Commission is advised and believes that the decree of the Court of Appeals of Maryland, dated July 16, 1928, properly construed, determines that it is confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States for the Commission to so calculate the Company's annual allowance for depreciation as to restore the cost, rather than the present day value, of property consumed or retired in the public service, and hence determines a Federal question of substance not theretofore determined by the Supreme Court of the United States, in a manner not in accord with the decisions of that Court in cases involving related questions, and unsound and untenable, and in conflict with the trend of authorities.

12. Your petitioners, for the reasons specified in the assignment of errors which is filed herewith, conceive themselves aggrieved by the said final decree made and entered by the Court of Appeals of Maryland on March 20th, 1929, and the decree made and entered by the Court of Appeals of Maryland on July 16, 1928, made final thereby, insofar as the same determined that the restoration through the annual depreciation allowance of the Company of the cost, rather than the present day value of its property consumed or retired in the public service, is confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, your petitioners pray that a cross-appeal may be allowed herein from the Court of Appeals of Maryland to the Supreme Court of the United States, and that an order may be passed fixing the amount of the bond on the said cross-appeal.

Thomas J. Tingley, Raymond S. Williams, Counsel for Harold E. West, Chairman, et al., Constituting the Public Service Commission of Maryland, Cross-appellants.

Order

And now, to wit, on April 9th, Nineteen Hundred and Twenty-nine, it is ordered that an appeal from the Court

of Appeals of Maryland to the Supreme Court of the United States be allowed as prayed, upon the filing of a bond in the sum of Five hundred dollars ($500), with good and sufficient security and The United States Fidelity & Guaranty Company is accepted as surety on said bond and said bond is now approved.

Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland.

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS ON CROSS-APPEAL OF HAROLD E. WEST ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND—Filed April 9, 1929

Now come Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, appellees in the Court of Appeals of Maryland, defendants in the Circuit Court No. 2 of Baltimore City, and hereinafter called Public Service Commission of Maryland, and for their assignment of errors show:

1. That the Court of Appeals erred in not reversing the decree of the Circuit Court No. 2 of Baltimore City, dated May 10, 1928, insofar as said decree adjudged and decreed that the annual depreciation allowance of The United Railways and Electric Company of Baltimore, fixed by Order No. 12,639 of the Public Service Commission of Maryland, passed on February 10, 1928, should be calculated to restore to the said Company the present value of its depreciable property, and that calculating said allowance so as to restore to the Company the cost of its depreciable property, (as was done by the said Commission in the said Order), was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

2. That the Court of Appeals of Maryland erred in holding in its Opinion and Decree dated July 16, 1928, made final by its decree entered March 20, 1929, that the annual depreciation allowance of The United Railways and Electric

Company of Baltimore, fixed by the Order No. 12,639 of the Public Service Commission of Maryland, passed on February 10, 1928, so as to restore to the Company the cost of its depreciable property, and not the present value thereof, was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Wherefore the Public Service Commission of Maryland prays that the said decree of the Court of Appeals of Maryland made and entered on July 16, 1928, and made final by its decree dated March 20, 1929, be reversed, and that said Court may be directed to enter a decree in favor of the Public Service Commission of Maryland.

Thomas J. Tingley, Raymond S. Williams, Counsel for the Public Service Commission of Maryland, Cross-appellants.

Bond on appeal, approved and filed April 9, 1929, omitted in printing.

Citation, in usual form, showing service on Charles McHenry Howard et al., omitted in printing.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928.

No. 826

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PRINTING—Filed April 10, 1929.

Come now Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, cross-appellants in the above entitled cause, and adopt their assignments of error as the points upon which they intend to rely in said cause.

Thomas J. Tingley, Raymond S. Williams, Counsel for Harold E. West et al., Constituting the Public Service Commission of Maryland, Cross-appellants.

Service of copy of within designation of points to be relied on admitted this 9th day of April, Nineteen Hundred and Twenty Nine.

Charles McHenry Howard, Charles Markell, Henry H. Waters, Counsel for the United Railways and Electric Company of Baltimore, Cross-appellee.

STIPULATION

In lieu of designation and counter-designation by the respective parties to the above appeal of the parts of the record to be printed, it is hereby stipulated and agreed as follows:

Both parties to the above appeal state that in their opinion the whole of the record as filed is necessary for the consideration of the case, that said record has been printed and used at the hearing in the Court below, namely, the Court of Appeals of Maryland, that twenty-five (25) copies of said record as printed for use in the Court of Appeals of Maryland have been transmitted to the Clerk of the Supreme Court of the United States (including the portion of said record so printed and transmitted on the former appeal to the Supreme Court of the United States, No. 465, October Term, 1928, dismissed for want of finality in the decree appealed from), and that said copies so printed may be used by the Clerk of the Supreme Court of the United States in the preparation and as part of the printed record of the Supreme Court of the United States in the above entitled case.

Thomas J. Tingley, Raymond S. Williams, Counsel for Harold E. West, Chairman, et al., Constituting the Public Service Commission of Maryland, Appellants. Charles McHenry Howard, Henry H. Waters, Chas. Markell, Counsel for the United Railways and Electric Company of Baltimore, Appellee.

[File endorsement omitted.]

Clerk's certificate to foregoing omitted in printing.

Endorsed on cover: File No. 34,135. Maryland Court of Appeals. Term No. 826. Harold E. West, chairman, and J. Frank Harper and Steuart Purcell, members, constituting the Public Service Commission of Maryland, appellants, vs. The United Railways and Electric Company of Baltimore. (Vide No. 792.) Filed April 10th, 1929. File No. 34,135.

(6940)